ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

WEDNESDAY, SEPTEMBER 24, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The subcommittee met, pursuant to adjournment, in the room of the Committee on Appropriations, at 10 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman), Lenroot, and Chamberlain.

Senator WARREN. Col. Rigby is here this morning, and we shall hear him now.

STATEMENT OF LIEUT. COL. WILLIAM C. RIGBY, JUDGE ADVOCATE, OFFICE OF THE JUDGE ADVOCATE GENERAL.

Senator WARREN. Colonel, will you give the stenographer your name and rank?

Lieut. Col. RIGBY. William C. Rigby, lieutenant colonel, judge advocate, at present on duty in the Office of the Judge Advocate General, room 129, State, War, and Navy Building; temporarily assigned to what is called the legislative section of the office.

Senator WARREN. Colonel, you have been on the other side, have you not?

Lieut. Col. RIGBY. Yes, sir.

Senator WARREN. How long did you serve over there?

Lieut. Col. RIGBY. I went over there, sailing on the 7th of April last, I think. I was not over there prior to that. I came into the service from civil life, from the practice of law, in August, 1918.

Senator WARREN. You came into the military service in August, 1918?

Lieut. Col. RIGBY. In August, 1918. I had been practicing law in Chicago, and I was assigned to duty in the Office of the Judge Advocate General, in the Military Justice Division of the office, and remained there until I left for Europe in April last.

Senator WARREN. Tell us of your service there.

Lieut. Col. RIGBY. I served in the different sections of the Military Justice Division, first in what was known and still is known as the retained-in-service section, reviewing the records of cases of the more minor character, where there was no dishonorable discharge, the man remaining in the Army.

Then I was transferred, after a while, to the disciplinary barracks section, reviewing cases of men sentenced to the disciplinary barracks.

From there I went to the penitentiary section and stayed in the penitentiary section for some time reviewing the cases of men sentenced to the penitentiary; and then I was transferred to what was known as the death and dismissal section, reviewing sentences of death and dismissals of officers, and I stayed there from, I think, November until I left, in April.

I was for a time chief or acting chief of that section, but about February was assigned to the work of examining the statutes and regulations and laws of Great Britain, France, and Italy, and that took me away to some extent from the work of the Military Justice Division proper, and I did not act as chief of the section after that.

Senator WARREN. Your work there was at different headquarters, or at the headquarters, or at Paris, or where?

Lieut. Col. RIGBY. In my work abroad an office was given me at Paris, from which I worked; and later on, just the last two or three weeks, I was given an office in the headquarters at London when I was there a good deal.

Senator WARREN. At London, did you say?

Lieut. Col. RIGBY. At London, the last two or three weeks I was there, I had an office given to me. My work was chiefly at Paris and London, and then from those headquarters, visiting, where I needed to, the British and the French armies, and some little examination was made of the Belgian system.

Maj. W. Calvin Wells, Judge Advocate, was assigned to me as assistant. He had formerly been on duty in the Judge Advocate General's Office as the chief of the disciplinary barracks section of the Judge Advocate General's Office, and was sent to France and assigned to duty in the Military Justice Division of the office of the Acting Judge Advocate General at Chaumont, I think in January, and then was assigned to assist me after I went over there. I think he came to me in May. I might say that Maj. Wells has now returned to civil life. He is really quite a well-known, really a distinguished, lawyer of Mississippi. I think that he was the secretary of Senator Harrison's campaign committee during the last senatorial campaign.

He did most of the work of the investigation in Belgium. I went up with him the first time, and we met, together, the Secretary of War and the other officials in Belgium; and then I turned that work over to him, so that really my information as to Belgium, outside of the statutes and regulations, comes to me from Maj. Wells's report.

Investigations outside of those countries were simply made by correspondence through military attachés who procured for me laws and regulations, and some rather fragmentary information in Italy, Switzerland, Holland, Denmark, Sweden, and Norway; and I was given some translators in the Paris office to translate them. That was all that I could do with that work.

Senator WARREN. I judge from your testimony that you know something of the administration of military justice in the English Army and in the French Army?

Lieut. Col. RIGBY. Yes, sir.

Senator WARREN. And in Belgium?

Lieut. Col. RIGBY. Yes.

Senator WARREN. If you feel free to tell us, what can you say as to the comparison of the American system, under the laws as they stand, with the systems of foreign countries?

Lieut. Col. RIGBY. I had thought possibly it might be most convenient to take it up somewhat by sections, and perhaps with relation to some of the things in the pending bill which is before you. I wondered how you would want it.

Senator WARREN. Well, Colonel, you are before this committee to inform the committee what your judgment is, based, of course, upon your experience, as to the necessity of changing our present Articles of War and how to change them, and we have before us the bill, which you have seen, which has been introduced by Senator Chamberlain. Of course you are familiar with the laws as they stand. I presume that Senator Chamberlain will understand, with other Senators, that if his bill is perfection, we want that, and if it is not perfection, and there is any way to improve that bill as well as to better the system, this subcommittee, of course, is open to hear about it. Am I right on that?

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. I would ask, Senator, whether in your judgment it would not make my testimony more valuable for me to take one section, say, as to the composition of the court, and speak of that.

Senator WARREN. Proceed in your own way.

Lieut. Col. RIGBY. I think perhaps I might make it a little briefer and clearer in that way.

Senator CHAMBERLAIN. What are you going to take up, the Senate bill 64 with the comparative print of the present law, or how do you take that up?

Lieut. Col. RIGBY. Suppose that I speak first of the composition of the court as it is proposed in this bill and as I find it in France and Great Britain.

Senator CHAMBERLAIN. Will you refer to the articles as you go along?

Lieut. Col. RIGBY. Certainly, sir. The articles of the proposed bill, of Senate bill 64, that as I understand relate to the composition of the court, are——

Senator WARREN. That bill is intended, as I understand it, to reform the entire Articles of War—the entire system of military justice.

Senator CHAMBERLAIN. Not all. Some sections are wholly unchanged.

Senator WARREN. Yes; I understand; but the intention is to substitute this bill in place of the present Articles of War, although some parts of the Articles of War are inserted unchanged in this bill. Am I right about that?

Senator CHAMBERLAIN. Senate bill 64 is a redraft of the Articles of War and has many articles which are not changed at all.

Senator WARREN. Yes, exactly; but the bill is intended to take the place of the Articles of War, although part of the Articles of War are unchanged in the bill.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. As I understand it, the outstanding features of the changes in the courts are those mentioned in articles 4, 5, 6, 10, 12, and 23, relating to special and general courts. The outstanding proposed changes as I see them are:

First, to make a court of a fixed number, of eight I think it is, for the general court and of three for the special court, instead of a number which may vary, as at present.

Second, that in both the general and the special court, enlisted men may be members, and in the case of the trial of privates by general court, at least three members of the court sitting on the trial must be private soldiers, and in the trial of a noncommissioned officer or warrant officer, at least three members of the court must be noncommissioned officers or warrant officers; and in the special court there must be at least one member who is a private or a noncommissioned officer under similar circumstances.

Third, that there is to be with every general or special court an officer to be designated as "judge advocate"; but whose functions are radically different from those of the present trial judge advocate; who is not to be a prosecutor at all, but is rather to be a judge.

Fourth, that the court is not to impose sentence, but is only to make findings of guilt or innocence, and that the judge advocate is to have the power and the duty to approve, or approve in part, and I assume to disapprove, the findings; and the power to impose sentence; and also the power to suspend in whole or in part any sentence which does not extend to death or dismissal.

Fifth, that the rulings and advice of the judge advocate are to govern the court.

Sixth, as to the organization of the court, the change is also that, instead of the members of a court being appointed directly by the convening authority, the convening authority is only to name a panel from which the judge advocate is to organize the court at the trial.

Seventh, that the right of peremptory challenge is to be introduced.

Before going on to compare that with the analogous laws, or the corresponding laws, rather, of the other countries, I might say that there are, as I understand it, really two different philosophies as to the functions and the powers and duties of courts-martial; and, as I understand it, the basic purpose of Senate bill 64 is to radically change the philosophy, if one may use that word, of the system of administration of military justice. I think it has been said by some that the proposal is to change the system from a system governed by the authority of military men to a system governed by law. As I understand it, I think it would be fairer to say that it is to change the authority in the matter of the government of the court and the administration of military law, as proposed, from military men to lawyers. I suppose that the law is—well I mean this, that somebody has to administer any system of law, so that in the end it is a question of who administers it. Everyone, even its severest critics, will concede that the present system is a system, in a sense, certainly, of law. It is administered within the laws provided; and the proposed system would have to be administered by somebody.

Senator CHAMBERLAIN. It is administered practically by the commanding officer.

Lieut. Col. RIGBY. The commanding officer has the power to approve or disapprove the sentences of courts. The men on the courts are officers of the Army.

Senator CHAMBERLAIN. Appointed by the commanding officer?

Lieut. Col. RIGBY. Yes, sir; and the proposal, as I understand it, is to place the predominating authority, both in the trial and in the review afterwards, in the hands, not of the commanding officer or of a military man, but of a civilian lawyer.

Turning, then, to the composition of the court as we find it in the other armies, first as to the place of the proposed judge advocate, I do not find that there is any other system, so far as my investigation went, that gives to any such officer nearly as broad powers, as are proposed in Senate bill 64. These proposed powers, to a large extent, are experimental; in the sense that they never have been tried before in any other army. The supposed model for the proposed judge advocate is, of course, the judge advocate of the British general court-martial.

Senator CHAMBERLAIN. Right in that connection, would you state who the judge advocate general is in Great Britain; how he is appointed, his tenure of office, and whether or not he is in the military establishment?

Lieut. Col. RIGBY. Surely, Senator. I was, of course, speaking of the judge advocate attached to the court, what we would call the trial judge advocate; but I will be glad to answer the other now.

The judge advocate general of Great Britain is a civilian. He is appointed by patent from the Crown and is appointed for life, with the right to retire at 65 years of age. He receives a salary of 2,000 pounds per annum. The present judge advocate general is Hon. Felix Cassel, who was a barrister, and a distinguished barrister, before his appointment. Judge Cassel went into the army on the outbreak of the war. I think he was a captain. On the death of Sir Thomas Milvain, the former judge advocate general, Judge Cassel was, in October, 1916, appointed judge advocate general, and has served as such since.

Senator CHAMBERLAIN. He resigned his commission in the army?

Lieut. Col. RIGBY. He resigned his commission in the army, because he is required to be a civilian.

Senator WARREN. I understand the judge advocate general has a life commission and is retired at 65 years of age.

Lieut. Col. RIGBY. Yes.

Senator WARREN. He receives a salary of £2,000 a year?

Lieut. Col. RIGBY. That is my understanding of the salary. The powers of the judge advocate general are advisory only, at present. They have, indeed, always been advisory; although it seems that up to about 1905, because the judge advocate general in those days tendered his advice directly to the Sovereign, his powers were sometimes considered as almost what might be called executive; although even then they were really only advisory, and back in 1873 Sir George Jessel and Lord Coleridge gave an opinion that the powers of the judge advocate general were only advisory. Nevertheless, in practice, in those times he sometimes acted almost as though the office were executive. And sometimes, in those days, his advice to the Crown was in the form "must be quashed," and similar expressions. In those days the judge advocate general had a seat in Parliament, and, as I said, tendered his advice directly to the Crown, so that the advice may, in a sense, have been almost tantamount to orders.

That was changed when Sir Thomas Milvain was appointed judge advocate general, in 1905. There was no change in the statute, but

a change in the wording of the patent under which he took office. He was not made a member of Parliament, or rather he resigned his seat in Parliament, because he had been a member in Parliament before that time, and he became simply the adviser to the war department; and that new plan was continued on the appointment of Judge Cassel.

The result of it is that the judge advocate general is no longer a direct adviser to the Sovereign; but now reports in a "minute," as it is called, to the "S. of S.," which means the secretary of state for war. But that does not go directly to the secretary of state for war; it goes, in fact, to the deputy adjutant general, by whom it is reviewed, and who is the one who tenders the advice to the secretary of state for war. The present deputy adjutant general is Maj. Gen. Sir B. E. W. Childs, K. C. M. G., C. B.

Senator CHAMBERLAIN. Does he exercise the power, in reviewing the minutes of the judge advocate general, to reverse or change the recommendations of the judge advocate general?

Lieut. Col. RIGBY. Yes, sir; that is, he may or may not agree with the judge advocate general. Of course, in the great majority of cases he agrees. I have, among other papers, a signed statement by Gen. Childs, which I might put in evidence if you care to have it, in which that, among other points, is covered. I have the original here, which really belongs to the files of the Judge Advocate General's Office, but I have a copy which I can furnish.

Senator WARREN. Very well.

Lieut. Col. RIGBY. Gen. Childs speaks in the highest possible terms of Judge Cassel. Perhaps I misspoke when I said that I had a signed interview from Gen. Childs. What I have is the transcript of the interview, corrected by Gen. Childs personally, and his letter returning it with his corrections. He did not personally sign the interview; but he returned it with a letter with his corrections. I will put the letter in with the transcript.

(The document and letter referred to are printed in full in the record as a part of Lieut. Col. Rigby's statement of Sept. 25, 1919, infra, pp. 455–468.)

Senator CHAMBERLAIN. Before leaving that branch of the subject, have you the laws fixing and defining the duties and powers of the judge advocate general in Great Britain?

Lieut. Col. RIGBY. Yes, sir.

Senator CHAMBERLAIN. Will you have that put in the record?

Lieut. Col. RIGBY. I will be glad to do so; there is really not very much about it in their statutes and regulations; that was one reason why I got these authoritative statements from Judge Cassel and Gen. Childs, which I am going to put in. And I will put in here also copies of some letters and "minutes" given me as specimens by Judge Advocate General Cassel, showing in just what form his advice is tendered, both as to charges before trial and upon reviewing the record after trial. I am putting in copies of three letters advising upon charges before trial and of seven "minutes" containing recommendations of the judge advocate general after trial. These are all copies of actual documents except that names are deleted. You will observe that the letters concerning charges before trial are not signed by Judge Cassel himself, but by his "military assistant." This is in pursuance of his policy of so dividing up the work in his office that

the same man will not pass upon the charges before trial and also upon the record of the case after trial. In selecting the "minutes" of recommendation after trial, of which I have quite a number, I have chosen these seven, which, I think, fairly represent the different classes of cases that most often arise. I am putting in two general court cases, one where confirmation is recommended and one where it is not; two district courts-martial; and three field general court cases. In reading them you will notice that the judge advocate general tenders his advice in the form of an "opinion" in very much the language that a lawyer would use in giving an opinion to a client as to a title to real estate. His usual formula is, "In my opinion the evidence did not justify a conviction, and accordingly the proceedings should not be confirmed"; or, "I am of opinion that the conviction should be quashed and the accused relieved from all the consequences of his trial."

BRITISH LAWS AND REGULATIONS RELATING TO THE JUDGE ADVOCATE GENERAL.

REFERENCES OF CHARGES TO JUDGE ADVOCATE GENERAL BEFORE TRIAL.

12. At home stations in all cases of fraud the charge and summary of evidence must be submitted to the judge advocate general before the trial is ordered. This does not apply to cases of simple theft. (King's Regulations, par. 561A; printed in the Manual of Military Law, p. 396, as Note 12, to sec. 17 of the Army act.)

2. In the case of a general court-martial in the United Kingdom, the charge sheet and summary of evidence should invariably be submitted by the convening officer to the judge advocate general before the court is convened. (Note 2, to Rules of Procedure, 17; Manual of Military Law, p. 580.)

HISTORY OF THE OFFICE OF JUDGE ADVOCATE GENERAL.

58. By the side of the civilian officers above mentioned (i. e., secretary of war, third secretary of state, secretary of state—W. C. R.) there was the purely military administration, which remained under the direction of the sovereign as commander in chief, assisted by a board of general officers, till the establishment of the office of the general commanding in chief in 1793. The administration of military law was, however, checked by the judge advocate general, a privy councillor, and usually a member of Parliament and one of the ministers of the day, who advised the sovereign on the legality of the proceedings of courts-martial. (See Clode's Military Forces of the Crown, Ch. XXVII.) The office of the judge advocate general, having ceased to be paid, was, in 1892, made nonpolitical, and was, from that date down to 1905, held by the president of the probate, divorce, and admiralty division. In that year, on a new appointment being made to the office, the position of the judge advocate general was considerably altered. He is now a permanent official under the orders of, and acting as legal adviser to, the secretary of state; he is no longer a privy councillor, nor does he advise the Crown directly. (Manual of Military Law, p. 161.)

TRIAL AND AFTER.

103. The powers and duties of a judge advocate are as follows:

(*b*) At a court-martial he represents the judge advocate general. (Rules of Procedure, 103B; Manual of Military Law, p. 629.)

In the case of a general court-martial in the United Kingdom, the warrant to the convening officer does not give him power to appoint a judge advocate. Application must be made to the judge advocate general for the necessary authority. (Rules of Procedure, 101, note 1; Manual of Military Law, p. 629.)

165. The original proceedings of a court-martial, purporting to be signed by the president thereof and being in the custody of the judge advocate general, or of the officer having the lawful custody thereof, shall be deemed to be of such a public nature as to be admissible in evidence on their mere production from such custody; and any copy purporting to be certified by such judge

advocate general or his deputy authorized in that behalf or by the officer having such custody as aforesaid, to be a true copy of such proceedings or of any part thereof, shall be admissible in evidence without proof of the signature of such judge advocate general, deputy, or officer; and a secretary of state, upon production of any such proceedings or certified copy, may, by warrant under his hand, authorize the offender appearing therefrom to have been convicted and sentenced to any punishment, to be imprisoned and otherwise dealt with in accordance with the sentence in the proceedings or certified copy mentioned. (Army act, sec. 165.)

592. When a general court-martial is held at home the proceedings are to be transmitted by the judge advocate direct to the G. O. C. in C. who convened the court, and the latter will forward them, together with his recommendation and remarks, to the judge advocate general. If the sentence awarded is one which requires to be confirmed by His Majesty the King, the judge advocate general will transmit the proceedings to the secretary of state for war for confirmation by His Majesty. If the sentence awarded is one which does not require confirmation by His Majesty, the judge advocate general will, after review, return the proceedings to the G. O. C. in C. for confirmation or such action as may be necessary, and, after completion, the G. O. C. in C. will forward the proceedings to the war office. If a general court-martial is held elsewhere, the proceedings will be forwarded to the officer having power to confirm the findings and sentences of general courts-martial, who, if from any cause he has no power to confirm the finding and sentence of that particular court-martial will forward the same to the judge advocate general for transmission to the secretary of state for war for confirmation by His Majesty. (King's Regulations, par. 592, as amended by Army Order No. 110, Mar. 17, 1917.)

SPECIMENS OF LETTERS FROM "MILITARY ASSISTANT" OF BRITISH JUDGE ADVOCATE GENERAL, ADVISING AS TO FORMS OF CHARGES AND REFERENCES OF CASES FOR TRIAL.

JULY 1, 1919.

Upon the evidnce submitted, I am of opinion that the first charge (now submitted under section 40) should be laid under section 6(1)(b) framed as follows:

"Leaving his picquet without orders from his superior officer, ———, in that he, ——— at ——— on the night of the ——— whilst acting under the orders of ———, and in command of a picquet of the ———, left his picquet without orders to do so."

In support of this charge ——— must state clearly that the accused was acting under his orders, that he gave the accused no order to leave his picquet on the night in question, and that no one else had authority to give such order.

The evidence on the charge of drunkenness is not strong nor is it, in my opinion, sufficient to justify trial upon the second charge submitted under section 19 of the army act as now amended in blue pencil, unless one, at least, of the witnesses for the prosecution is prepared to state on oath that, in his opinion, the accused was drunk.

Otherwise the evidence outlined in the abstract is in order.

Kindly submit the name of a suitable officer for appointment to act as judge advocate at the trial.

H. D. F. MACGEAGH,
Lieutenant Colonel, A. A. G.

JULY 18, 1919.

The General Officer i/c Administration.

If, as appears from the evidence, the accused was at the time of the alleged offense attached to the royal air force, he would be subject to the air force act, as modified by section 179A of that act amended by the air force act (statutory amendments) order, 1919 (A. M. W. O. 603/19) and not to the army act. Before advising on the case it will be necessary for me to be definitely informed whether or not the accused was in fact attached to the royal air force, and to have before me a copy of the order of attachment, if any.

Documents returned herewith. Kindly resubmit.

K. MACMORRAN, *Captain, S. C.*,
For Lieutenant Colonel A. A. G.,
Military Assistant.

JULY 22, 1919.

The general officer commanding in chief, ———.
Second Lieut. ———.

Upon the evidence in the summary I am of opinion that the accused should be tried upon a charge under section 15 (1) of the army act in substitution for the charge submitted under section 9 (2), framed as follows:

"Absenting himself without leave, ———, in that he, ———, at ———, on the ———, absented himself without leave until the ———."

There is a discrepancy in dates between the evidence of the second and third witnesses. It would appear that the date to which Capt. ——— refers is the 24th of June and not the 23d. He should make this clear at the trial.

Otherwise the evidence as amended is in order.

Formal appointment of ——— to act as judge advocate at the trial is forwarded herewith.

H. F. MACGEAGH,
Lieutenant Colonel, A. A. G., Military Assistant.

SPECIMENS OF "MINUTES" ADDRESSED BY BRITISH JUDGE ADVOCATE GENERAL TO "S. OF S.", THE SECRETARY OF STATE FOR WAR.

S. of S.

Herewith I forward proceedings of a general court-martial held at ——— on the ——— for the trial of ——— an officer of the regular forces, who was tried on the following charges:

1. Deserting His Majesty's service, ——— in that he, ——— at ——— on ——— absented himself from the ——— until apprehended by the civil power at Cork on the ——— dressed in plain clothes.

2. When concerned in the care of public money fradulently misapplying the same, ——— in that he, ——— at ——— on ——— when he was concerned in the care of ——— the property of the public being the proceeds of three cheques for ———, ——— and ——— drawn upon public accounts applied the same to his own use with intent to defraud.

The accused was found guilty of both the charges and sentenced to be cashiered and to be imprisoned without hard labor for one year.

I have the honor to inform you for the information of His Majesty the King that the charges were well laid, that there was evidence to justify the findings of the court, and that the sentence was according to law.

The recommendation of the ——— is attached.

F. CASSEL, J. A. G.

J. A. G.'s OFFICE.
March 28, 1919.

S. of S.

Herewith I forward the proceedings of a general court-martial held at ——— on the ——— for the trial of Second Lieut. ———, who was tried on four charges, as follows:

1. Behaving in a scandalous manner unbecoming the character of an officer and a gentleman, ——— in that he———, at ———, on ———, in exchange for £1 (one pound) in cash, gave ——— a check for £1 (one pound) on Messrs. Holt & Co., army agents, well knowing that he had not sufficient funds in the hands of the said agents to meet the said check, and having no reasonable grounds for supposing that the said check would be honored when presented.

2. An alternative charge under section 40.

3. A similar charge under section 16, relating to a check for £12, given to Lieut. ——— at ——— on ——— in payment of his mess account.

4. An alternative charge under section 40.

who was found not guilty of the first, second, and fourth charges and guilty of the third charge, and was sentenced to be cashiered.

I have to point out that in my opinion the evidence did not justify a conviction under section 16 of the Army act and that accordingly the proceedings should not be confirmed.

The recommendation of the general officer commanding in chief, ———, is attached.

S. of S.

In forwarding the proceedings of a district court-martial held at ——— on the ——— for the trial of Pvt. ———, I have to point out that there was no evidence before the court that Maj. A. either on ——— or on ——— gave any orders to the accused as alleged in the charges.

In these circumstances I am of opinion that the conviction on both charges should be quashed, and the accused relieved from all the consequences of his trial.

F. CASSEL, J. A. G.

SEPTEMBER 12, 1918.

S. and S.

In forwarding the proceedings of a district court-martial held at ——— on the —— for the trial of Corpl. ———, I have to say that in my opinion the evidence before the court did not justify a conviction on a charge of desertion.

In these circumstances I am of opinion that the conviction should be quashed and the accused relieved from all the consequences of his trial.

I desire to add that there was no evidence before the court that the accused ever received A. F. 33959 and a free warrant.

F. CASSEL, J. A. G.

AUGUST 14, 1918.

S. of S.

In forwarding the proceedings of a field general court-martial held at ——— on the ——— for the trial of Pvt. ——— I have to say that in my opinion upon the evidence given at the trial the accused could not reasonably or safely be convicted of willfully maiming himself.

Moreover, A. F. W. 3428 was not admissible in evidence and was prejudicial to the accused.

In these circumstances I am of opinion that the conviction on the first charge should be quashed and the accused relieved from all the consequences of his trial.

F. CASSEL, J. A. G.

AUGUST 15, 1918.

S. of S.

In forwarding the proceedings of a field general court-martial held at ——— on the ——— for the trial of ——— and ———, both of the ———, I have to say that in my opinion the special finding amounts to an acquittal of the charge as laid and a conviction of a different offense.

Under these circumstances I am of opinion that the conviction should be quashed and each of the accused relieved from all the consequences of his trial.

F. CASSEL, J. A. G.

JULY 12, 1918.

S. of S.

In forwarding the proceedings of a field general court-martial held ——— on the ——— for the trial of ——— I have to point out that contrary to the provisions of section 54(2) of the army act the court, after having arrived at their finding and awarded sentence, proceeded to take further evidence upon reassembly for revision.

Under these circumstances I am of opinion that the conviction should be quashed and the accused relieved from all the consequences of his trial.

I desire to add that the order for revision is not attached to the proceedings, but it appears from the attached minute from the major general commanding ——— that the court was reassembled for that purpose.

F. CASSEL, J. A. G.

Senator CHAMBERLAIN. Have you a copy of the articles of war of Great Britain?

Lieut. Col. RIGBY. They do not have articles of war in that form any more. Their articles of war were merged into the army act of 1881, I think, which has been reenacted ever since. What they have is the army act, the annual act; and then they have the rules of procedure, which are promulgated under a provision of the army

act quite similar to our thirty-eighth article of war, providing that rules of procedure may be enacted by the sovereign and must be submitted to Parliament (army act, sec. 70); and with that they also have "King's Regulations," covering minor details, so that they have the three sources of authority or law. There is statutory authority to enact "articles of war," (army act, sec. 69), but it has fallen into disuse.

Senator WARREN. You say the army annual act?

Lieut. Col. RIGBY. Yes, sir.

Senator WARREN. That is not connected with the support of the army—that is, the appropriations of the army—is it?

Lieut. Col RIGBY. No, sir; that inherits from the old mutiny act of 1689.

Senator WARREN. Do they undertake to reform it or reenact it in an act every year?

Lieut. Col. RIGBY. It is reenacted every year. It automatically goes out of force, and if it were not reenacted the Army would go out of existence.

Senator WARREN. It is enacted each year as it stands or as it may be changed?

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. It is reenacted every year.

Lieut. Col. RIGBY. Every year; and they do change it somewhat from time to time. In the 1919 reenactment they put in a change that Judge Cassel suggested, giving general officers disciplinary power over officers; so that for minor offenses it will not be necessary to bring an officer before a general court-martial.

Senator WARREN. Now, why is not that a good idea? Have you thought of that, Senator?

Senator CHAMBERLAIN. I think the British system is generally a good one. When you come to revise your statement made here, Colonel, refer us to the last annual act for the British Army, so that we may have it printed in the record, and the Senate may have access to the statute.

Lieut. Col. RIGBY. I will do so, Senator. In fact, I have them right here, so that I can easily refer to it. The army act was revised and reprinted as a whole in 1918.

(The act referred to is here printed as follows:)

ARMY (ANNUAL) ACT, 1919 (9 GEO. 5, CH. 11).

CHAPTER 11.

An act to provide, during 12 months, for the discipline and regulation of the army.

Whereas the raising or keeping of a standing army within the United Kingdom of Great Britain and Ireland in time of peace, unless it be with the consent of Parliament, is against law; and

Whereas it is adjudged necessary by His Majesty and this present Parliament that a body of forces should be continued for the safety of the United Kingdom and the defense of the possessions of His Majesty's Crown, and that the whole number of such forces should consist of 2,650,000, including those to be employed at the depots in the United Kingdom of Great Britain and Ireland for the training of recruits for service at home and abroad, but exclusive of numbers actually serving within his Majesty's Indian possessions; and

Whereas it is also judged necessary for the safety of the United Kingdom, and the defense of the possessions of this realm, that a body of Royal Marine forces should be employed in His Majesty's fleet and naval service, under the direction of the lord high admiral of the United Kingdom, or the commissioners for executing the office of lord high admiral aforesaid; and

Whereas the said marine forces may frequently be quartered or be on shore, or sent to do duty or be on board transport ships or vessels, merchant ships or vessels, or other ships or vessels, or they may be under other circumstances in which they will not be subject to the laws relating to the government of His Majesty's forces by sea; and

Whereas no man can be forejudged of life or limb, or subjected in time of peace to any kind of punishment within this realm, by martial law, or in any other manner than by the judgment of his peers and according to the known and established laws of this realm; yet, nevertheless, it being requisite, for the retaining all the before-mentioned forces, and other persons subject to military law, in their duty, that an exact discipline be observed, and that persons belonging to the said forces who mutiny or stir up sedition, or desert His Majesty's service, or are guilty of crimes and offenses to the prejudice of good order and military discipline, be brought to a more exemplary and speedy punishment that the usual forms of the law will allow; and

Whereas the army act will expire in the year 1919 on the following days:

(a) In the United Kingdom, the Channel Islands, and the Isle of Man on the 30th day of April; and

(b) Elsewhere, whether within or without His Majesty's dominions, on the 31st day of July:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This act may be cited as the army (annual) act, 1919.

2. (1) The army act shall be and remain in force during the periods hereinafter mentioned, and no longer, unless otherwise provided by Parliament; that is to say:

(a) Within the United Kingdom, the Channel Islands, and the Isle of Man, from the 30th day of April, 1919, to the 30th day of April, 1920, both inclusive; and

(b) Elsewhere, whether within or without His Majesty's dominions, from the 31st day of July, 1919, to the 31st day of July, 1920, both inclusive.

(2) The army act, while in force, shall apply to persons subject to military law, whether within or without His Majesty's dominions.

(3) A person subject to military law shall not be exempted from the provisions of the army act by reason only that the number of the forces for the time being in the service of His Majesty, exclusive of the marine forces, is either greater or less than the number hereinbefore mentioned.

3. There shall be paid to the keeper of a victualing house for the accommodation provided by him in pursuance of the army act the prices specified in the schedule to this act.

AMENDMENTS OF THE ARMY ACT.

4. In section 42 of the army act (which relates to the mode of complaint by officers), after the words "examine into such complaint, and" there shall be inserted the words "if so required by the officer."

5. In subsection (1) of section 46 of the army act (which relates to the proceedings upon investigation of a charge), after the words "for bringing the offender to court-martial," there shall be inserted the words "or, in the case of an officer below the rank of field officer, may refer the case to be dealt with summarily by a general officer under the provisions of this act."

6. After section 46 of the army act the following section shall be inserted:

"46A. (1) Any of the following authorities shall have power to deal summarily with a charge against an officer below the rank of field officer referred for that purpose, or for trial by court-martial, under the foregoing section of this act—that is to say, any general officer authorized to convene a general court-martial—and also, on active service, the general officer commanding in chief in the field, and any officer (not under the rank of major general) appointed for the purpose by him, or by the army council.

(2) The authority having power to deal summarily with the case may, with or without hearing the evidence, dismiss the charge, if he in his discretion

thinks that it ought not to be proceeded with, or, where he thinks the charge ought to be proceeded with, take steps for bringing the offender to a court-martial, or may, after hearing the evidence deal with the case summarily by awarding one or more of the following punishments:

(*a*) Forfeiture of seniority of rank either in the Army or in the corps to which the offender belongs, or in both.

(*b*) Severe reprimand or reprimand.

(3) Where the authority having power to deal summarily with the case considers that he may so deal with the case, he shall, unless he awards a severe reprimand, or a reprimand, in every case ask the officer charged whether he desires to be dealt with summarily or to be tried by a court-martial, and if the officer elects to be tried by a court-martial, take steps for bringing him to trial by a court-martial, but otherwise shall proceed to deal with the case summarily.

(4) In every case where an authority has power to dispose of a case summarily, and decides so to do, the accused officer may demand that the evidence against him should be taken on oath, and the same oath or solemn declaration as that required to be taken by witnesses before a court-martial shall be administered to each witness in such case.

(5) An offender shall not be liable to be tried by court-martial for any offense which has been dealt with summarily under this section, and shall not be liable to be punished by a general officer under this section for any offense of which he has been acquitted or convicted by a competent civil court or by a court-martial."

7. Section 114 of the army act (which provides for the preparation of an annual list of persons liable to supply carriages and animals) shall be amended as follows:

In subsection (1A) the second paragraph shall be omitted.

After subsection (1A) the following subsection shall be inserted:

"(1B) With respect to horses, the following provisions shall have effect:

(*i*) It shall be the duty of the owner of any horse, and the occupier of any premises where horses are kept, to furnish, if so required, to the authority hereinafter mentioned before such date in each year as may be prescribed a return specifying the number of horses belonging to him or kept on his premises, and giving with respect to every horse such details as may be so prescribed; he shall also afford all reasonable facilities for enabling any horse belonging to him or kept on his premises to be inspected and examined as and when required by the said authority; if any person fails to comply with the said requirements of this paragraph, he shall be liable on summary conviction for each offense to a fine not exceeding £50.

(*ii*) The army council may, for the purposes of this subsection, make regulations prescribing anything which under this subsection is to be prescribed, and prescribing the forms to be used, and generally for the purpose of carrying this subsection into effect.

(iii) Regulations made by the army council may provide for excepting from the provisions of this subsection horses of any class or description specified in the regulations."

After subsection (3) the following subsection shall be inserted:

"(3A) If an officer is obstructed in the exercise of his powers under this section, a justice of the peace may, if satisfied by information on oath that the officer has been so obstructed, issue a search warrant authorizing the constable named therein, accompanied by the officer, to enter the premises in respect of which the obstruction took place at any time between 6 o'clock in the morning and 9 o'clock in the evening, and to inspect any carriages or animals that may be found therein."

For subsection (4) there shall be submitted the following subsection:

"(4) The authority for the purposes of this section shall be the army council or any authority or persons to whom the army council may delegate their powers under this section."

8. At the end of section 115 of the army act (which provides for the supply of carriages and animals in case of emergency) the following subsection shall be inserted:

"(10) A requisition of emergency issued under this section may prohibit, during such period as may be specified in the requisition, the sale and purchase of horses to or by any person other than a person appointed by the army council to purchase horses; and if any person sells or purchases or is concerned in the sale or purchase of a horse in contravention of such prohibition, he shall be liable on summary conviction to a fine not exceeding one hundred pounds or

to imprisonment for a term not exceeding three months, or to both such imprisonment and fine."

9. The following provision shall be added at the end of subsection (2) of section 131 of the army act (which provides for arrangement as to prisons with colonial governments):

"Notwithstanding anything in this act, a secretary of state may arrange with the governor of a colony that any person or class of persons enlisted in the colony shall, if sentenced under this act to penal servitude, be transferred to or kept in the colony and there undergo his sentence in any prison or place in which persons sentenced to penal servitude by a civil court in the colony can for the time being be confined or, if there be no such prison or place, in an authorized prison as defined by section 65 of this act."

10. (1) Where an order had, before the commencement of the army (annual) act, 1918, been made under section 145 of the army act authorizing deductions from pay, a further order maye be made increasing the amount of the deduction to be made after the commencement of this act under the former order up to the limit authorized by section 10 of the army (annual) act, 1918.

(2) This section shall, notwithstanding anything in section 14 of the army (annual) act, 1904, come into operation, both within the British Islands and elsewhere, on the passing of this act.

11. Section 153 of the army act (which inposes a punishment for inducing soldiers to desert) shall be amended as follows:

(*a*) For the words "any soldier," "a soldier," and "such soldier," wherever those words occur, there shall be substituted respectively the words "any officer or soldier," "an officer or soldier," and "such officer or soldier."

(*b*) After the word "desert," wherever that word occurs, there shall be inserted the words "or absent himself without leave," after the word "deserting" there shall be inserted the words "or absenting himself without leave," and after the word "deserter" there shall be inserted the words "or absentee without leave."

12. Subsection (1) of section 156 of the army act (which imposes penalties in respect to the sale of military necessaries) shall be amended as follows:

(1) For the words "an officer or soldier or any person acting on his behalf" in paragraph (*a*), and for the words "an officer or soldier" in paragraphs (*b*) and (*c*) there shall be substituted the words "any person."

(2) After the words "or clothing" there shall be inserted the words "issued for the use of officers or soldiers."

(3) For the words "or of the person with whom he dealt being or acting for a soldier, or that the same was sold by order of the Army Council or some competent military authority," there shall be substituted the words "or that the same was sold by order or with the consent of the Army Council, or some competent military authority, or that the same was the personal property of an officer who had retired or ceased to be an officer, or of a soldier who had been discharged, or of the legal personal representatives of an officer or soldier who had died."

In subsection (2) of section 156 of the army act, for the words "to a penalty not exceeding five pounds" there shall be substituted the words "to the same penalties as are prescribed in the case of a contravention of the last preceding subsection."

13. After section 156 of the army act, the following section shall be inserted:

"156A. If—

(*a*) any unauthorized person uses or wears any military decoration or medal, or medal ribbon, or any badge, wound stripe, or emblem supplied or authorized by the army council, or any decoration, medal, or medal ribbon, badge, wound stripe or emblem so nearly resembling the same as to be calculated to deceive; or

(*b*) any person falsely represents himself to be a person who is or has been entitled to use or wear any such decoration, medal, or medal ribbon, badge, wound strips, or emblem as aforesaid; or

(*c*) any person without lawful authority or excuse supplies or offers to supply any such decoration or medal as aforesaid to any person not authorized to use or wear the same;

such person shall be liable on summary conviction to a fine not exceeding £20 or to imprisonment for a term not exceeding three months:

"*Provided*, That nothing in this section shall be deemed to prohibit the wearing or supply of ordinary regimental badges or any brooch or ornament representing the same."

14. In paragraph (j) of subsection (1) of section 163 of the army act the words "or by whom the arrest" and the words "or arrest" shall be omitted.

15. The following paragraph shall be substituted for paragraph (3A) of section 175 of the army act.

"(3A) Officers of the territorial force other than members of the permanent staff, if on the active list at all times, and if on the territorial force reserve, at any time when they are doing duty with any body of troops for the time being subject to military law or are ordered on any duty or service for which as such reserve officers they are liable."

16. (1) Section 179A of the army act (which makes provision as to officers or airmen of the air force attached to or seconded for service with the regular forces) shall be amended as follows:

Paragraphs (a) and (b) of subsection (2) shall be omitted.

The following paragraph shall be substituted for paragraph (c) of subsection (2):

"(c) The finding and sentence of any general court-martial for the trial of any such officer or airman may be confirmed by His Majesty or by an officer authorized to confirm the findings and sentences of general courts-martial under the air-force act, and not otherwise, except that when such officer or airman, while subject to this act, is serving beyond the seas with a military force, and in the opinion of the general or other officer commanding that force (such opinion to be stated in the confirmation and to be conclusive) there is not present any officer authorized to confirm the findings and sentences of general courts-martial under the air-force act, the findings and sentences may be confirmed by a general or other officer authorized to confirm findings and sentences of general courts-martial under this act."

After paragraph (*f*) the following paragraph shall be inserted:

"(g) The power of a court-martial to inflict on an officer the punishment of forfeiture of seniority of rank shall include power to inflict a punishment of forfeiture of seniority of rank in the air force, or any corps or unit thereof, or both."

At the end of the section the following section shall be inserted:

"179–B. In the application of this act to officers of His Majesty's naval forces who are subject to military law, the power of a court-martial to inflict the punishment of forfeiture of seniority of rank shall include power to inflict the punishment of forfeiture of seniority of rank in the navy."

(2) The finding and sentence of any court-martial convened before the commencement of this act, under section 179–A of the army act, may, after that date, be confirmed in the manner provided for by this act.

17. In paragraph (e) of subsection (2) of section 180 of the army act (which relates to the application of the army act to His Majesty's Indian forces), after the words "court-martial," there shall be inserted the words "or where the case is dealt with summarily under the provisions of this act, the authority having power so to deal with the case."

18. (1) In paragraph (4) of section 190 of the army act (being the definition of "officer"), after the words "or part thereof," where they occur for the third time, there shall be inserted the following words:

"It also includes any officer of His Majesty's naval or air forces who is for the time being subject to military law."

(2) This section shall, notwithstanding anything in section 14 of the army annual act, 1904, come into operation, both within the British Islands and elsewhere, on the passing of this act.

SEC. 3. *Schedule—*

Accommodation to be provided.	Maximum price.
Lodging and attendance for soldier where meals furnished	Sixpence per night.
Breakfast as specified in Part I of the second schedule to the Army act	Sixpence each.
Dinner as so specified	One shilling and twopence each.
Supper as so specified	Fourpence each.
Where no meals furnished, lodging and attendance, and candles, vinegar, salt, and the use of fire, and the necessary utensils for dressing and eating his meat.	Sixpence per day.
Stable room without forage	Sixpence per day.
Lodging and attendance for officer	Two shillings per night.

NOTE.—An officer shall pay for his food.

Senator CHAMBERLAIN. Does that contain all that would ordinarily be termed articles of war?

Lieut. Col. RIGBY. No, sir. You have to take with that these rules of procedure. There is the army act; with these amendments of 1919 printed in a separate pamphlet. Then with that you have to take the rules of procedure and the King's Regulations, and one or two separate statutes. Those are all collected in what they call the Manual of Military Law. The last edition of that is the one of 1914, which covers everything; and then you have to pick out from the circulars the amendments since 1914—amendments to the King's Regulations and amendments of the rules of procedure.

Senator CHAMBERLAIN. Have you those so that you can submit them?

Lieut. Col. RIGBY. Yes.

Senator CHAMBERLAIN. Would you not like to have him leave them with us, Senator?

Senator WARREN. Yes; if you can get it all in concrete form, so that we may not have to spend a great deal of time in examining it. It looks as if it were rather involved, the way Col. Rigby states it. Please get it in the shortest form you can for us to examine. I think that it is highly important that we have access to it.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. I think I might make a compilation—in fact, I have already done that in connection with my report which I am getting up for the judge advocate general—of the regulations on the different subjects.

Senator CHAMBERLAIN. Of course, I do not wish to interfere now with your course that you have mapped out in your own way for addressing this committee, but I am anxious to ascertain the powers and the functions of the judge advocate general of Great Britain. You say that he was formerly an executive officer and later that function was changed?

Lieut. Col. RIGBY. No; he was never an executive officer; but in the old days he may sometimes have been treated as almost so, in practice, up to 1905.

Senator CHAMBERLAIN. As executive officer, he exercised the power of control over the sentences of court-martial?

Lieut. Col. RIGBY. The difference was that at that time he tendered his advice direct to the Sovereign, so that really there was no higher authority to check it over; whereas now he tenders his advice to the secretary of state for war through the deputy adjutant general, and it is checked over in every case by the deputy adjutant general.

Senator CHAMBERLAIN. What is the course of a sentence of a court-martial in Great Britain in the field? Does it go through military channels to the judge advocate general of Great Britain?

Lieut. Col. RIGBY. When you say " in the field," you mean outside of the United Kingdom?

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Because they make a distinction in that—between the United Kingdom and outside.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Outside, it goes to the confirming authority, who would probably be the commander in chief of the particular

expeditionary force, although not necessarily; that is fixed by the patent or warrant issued by the Crown; but it would probably be the commander in chief of the expeditionary force. He would be advised by the deputy judge advocate general on his staff, who is appointed on the recommendation of the judge advocate general.

Senator CHAMBERLAIN. Is he a civilian?

Lieut. Col. RIGBY. No; he is a military officer. He may be appointed from civil life. He may be a barrister, appointed to that position, but he is given military rank.

Senator CHAMBERLAIN. But the judge advocate general appoints him to attend each court-martial proceeding?

Lieut. Col. RIGBY. No; not the deputy judge advocate general; no, sir. I am speaking of the review. Perhaps, to get it perfectly clear, I might begin with the history of a case and trace it through.

Senator CHAMBERLAIN. Yes; I would like to have it.

Lieut. Col. RIGBY. If you will allow me, before I do that, I want to say just a word more about the course of the proceeding through the deputy adjutant general's office, so as to have that complete at this time.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. The record, after being reviewed, with the minute containing the recommendation of the judge advocate general, goes to Gen. Childs, as it is now; the deputy adjutant general. He always carefully and personally reviews the whole record, reads the whole record. What he says is that he has the very highest possible respect for the ability of Judge Cassel—speaks of him as a brilliant man, even said to me once in conversation that he considered Judge Cassel probably the foremost living military lawyer—but nevertheless he feels that it is his duty to himself examine the records, for two purposes; one, because he feels that he ought to examine them, and not pass them blindly; and the other, that by doing that he keeps in close touch with the discipline of the Army, and he thinks that of value.

If he agrees with the judge advocate general, then it is passed to the secretary of state for war, as a matter of course, for signature. If he disagrees or does not fully concur, he usually has a conference with Judge Cassel; they get together and see whether they can not agree. If they can not agree, then it is referred to the attorney general for his opinion—at present, Sir Frederick E. Smith—and they usually get together and try to agree. If, however, they are unable to agree, the theory is that the opinion of the attorney general, rather than the opinion of the judge advocate general, will be the one that will guide the secretary of state for war, on the theory that the judge advocate general is the adviser only to the war department, whereas the attorney general is the adviser to the whole Government.

Senator CHAMBERLAIN. He is a civilian?

Lieut. Col. RIRBY. He is a civilian, also; but the ultimate decision is wholly in the hands of the secretary of state for war, and he is not bound to follow the advice of either of them. He may do as he pleases.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Of course, in almost every case where it is purely a legal question, the advice of the judge advocate general is followed. There has been one class of cases on which Judge Cassel

and Sir Frederick Smith differed, and there were quite a number of cases of that class which came up during the war, and of course all of those went in that way—that is, the judge advocate general was overruled on all of these cases. Outside of that particular class of cases, there were very few where, on legal questions, they differed.

Senator CHAMBERLAIN. Does the judge advocate general assume the right to reverse a decision of a court-martial?

Lieut. Col. RIGBY. The Sovereign has the power to quash, as it is called, at any time; and after confirmation the judge advocate general may advise what they call quashal. That may come up better with relation to tracing a case through the courts outside of the United Kingdom, because that is the kind of case where that power more often comes in. In the United Kingdom, general court cases are all submitted to the judge advocate general, before confirmation, because the Sovereign is usually the confirming authority for general courts within the British Isles.

Senator WARREN. The British secretary of state for war corresponds to our Secretary of War?

Lieut. Col. RIGBY. Yes, sir. The present secretary of state for war is Winston Churchill.

Senator WARREN. He is like the commander of the army, who relies upon the military authorities here; and I presume the Sovereign there would rely upon the military authority there.

Lieut. Col. RIGBY. Of course, Winston Churchill personally signs without asking King George to sign; in most cases, at least, I take it.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. Now, as I say, the general course within the United Kingdom is that the record goes directly from the court to the judge advocate general.

Senator CHAMBERLAIN. Does that mean every record?

Lieut. Col. RIGBY. Every record of a general court within the United Kingdom.

Senator CHAMBERLAIN. Whether of an enlisted man or of a commissioned officer?

Lieut. Col. RIGBY. Yes; but, of course, you must remember that their general courts are practically all officers' courts. They scarcely ever use general courts for any other cases except officers' cases, except that, since the district court can not impose the death sentence and can not impose penal servitude (that is, a penitentiary sentence), the general court must be used where those sentences are contemplated. During times of peace the general court is practically never used except for officers' cases; because in time of peace they turn practically all civil offenses over to the civil courts for trial. During the war there have been, of course, some serious cases where it was anticipated that the death sentence would have to be imposed, or a sentence of penal servitude; but outside of those, they sent enlisted men before the district court.

Senator CHAMBERLAIN. So that the system differs radically from ours, in time of peace, in that infractions of law on the part of enlisted men are turned over to the civil courts for disposition?

Lieut. Col. RIGBY. For what we call civil crimes; yes, sir. But that is not restricted to enlisted men. They would turn over an officer charged with a civil crime, to the civil courts.

Senator CHAMBERLAIN. Like larceny or embezzlement?

Lieut. Col. RIGBY. Yes, sir. I can not quote now the statistics since the war began, because of the confidential character in which they were turned over to me by the British authorities, but for the nine years prior to the war I have examined the statistics, from 1905 to 1913, inclusive; and there were but 12 general courts-martial held within the United Kingdom in that time, an average of only one and one-third cases per annum; which means, of course, that all of the work, practically, was being done by the district courts.

Senator CHAMBERLAIN. That is, the civil courts?

Lieut. Col. RIGBY. No; the district court is a military court, too. It is the court that corresponds in a way to our special court; but it may punish with confinement up to two years. They held on an average about 3,800 district courts-martial every year during that time, when they were holding only one and one-third general courts per annum. I am talking, now, about within the United Kingdom.

Senator WARREN. And both within the army?

Lieut. Col. RIGBY. Yes; and both within the army.

Senator CHAMBERLAIN. Do you know how many cases were decided by the civil courts?

Lieut. Col. RIGBY. No, sir.

Senator CHAMBERLAIN. But that differs essentially from our system, where the military courts, even in time of peace, have jurisdiction of all those things.

Lieut. Col. RIGBY. It is rather a difference of policy and practice than of law; because their military courts would have the power, with some limitations as to the gravest crimes, to try these offenses by soldiers. But in practice, they do not. They turn over everything that they can in time of peace to the civil courts.

Now, of a general court outside of the United Kingdom, the record goes, as I said, to the general commanding, for confirmation.

Senator CHAMBERLAIN. That is, cases against officers?

Lieut. Col. RIGBY. Yes, sir; of course, any general court. Of course, the general court is used outside of the United Kingdom just as within.

At the general court, whether sitting in the United Kingdom or outside of the United Kingdom, wherever the general court sits, there is attached to it a judge advocate. I might say, to be perfectly correct, that what I am saying does not necessarily apply to India. There is a separate judge advocate general in India, who functions separately.

Senator CHAMBERLAIN. We do not care so much about that.

Lieut. Col. RIGBY. I will omit India, then.

Senator CHAMBERLAIN. The judge advocate is appointed by the judge advocate general?

Lieut. Col. RIGBY. Within the United Kingdom.

Senator CHAMBERLAIN. He attends these general courts outside of the United Kingdom?

Lieut. Col. RIGBY. Outside of the United Kingdom the commander in chief appoints the judge advocate. Within the United Kingdom the judge advocate would be appointed by the judge advocate general on the recommendation of the convening authority.

Senator CHAMBERLAIN. He attends all courts outside of the United Kingdom?

Lieut. Col. RIGBY. At every general court, whether in France or elsewhere abroad, or in the United Kingdom, there is a judge advocate. We might call him a trial judge advocate for distinction.

Senator CHAMBERLAIN. He is not a member of the court?

Lieut. Col. RIGBY. He is not a member of the court.

Senator CHAMBERLAIN. He does not participate in the trial?

Lieut. Col. RIGBY. He does not participate in the trial; no, sir; that is, he is not a member of the court.

Senator CHAMBERLAIN. He simply advises the court as to the admissibility of evidence?

Lieut. Col. RIGBY. Yes, sir. Now, the history of that is this. Of course, the trial judge advocate arose out of an officer who was substantially the same as our judge advocate; because if you go back to the time when we took the old 1774 articles, and practically adopted them in 1776, they then contemplated the kind of trial judge advocate who was also a prosecutor.

Senator CHAMBERLAIN. The systems were the same?

Lieut. Col. RIGBY. The same, substantially.

Senator CHAMBERLAIN. They modified theirs, and ours remain the same until now.

Lieut. Col. RIGBY. Theirs remained the same until in 1829, and in 1829 an act was passed permitting—not requiring, but permitting—the appointment of a separate prosecutor and providing that where such a prosecutor was appointed, in those cases the judge advocate should not prosecute, but should limit himself to advising the court. That left a double system running. That continued until 1860, if I remember correctly. I am quite sure it was 1860 or 1861. During that time there was, of course, a great deal of discussion, and in 1860 or 1861 the act was further amended forbidding the judge advocate from prosecuting in any case, which left him as simply the adviser to the court; and as the law has stood since, and in the form it now stands, he is the adviser to the court and is required to have substantially the same qualifications as to impartiality as a member of the court. He may be a civilian or he may be an officer. I have attended general court trials where a civilian was sitting as judge advocate, and I have attended general court trials where an Army officer was sitting as judge advocate; but in any event he would be a man skilled in the law.

Senator CHAMBERLAIN. He rules on questions of law and upon the admissibility of evidence and acts as general adviser to the court?

Lieut. Col. RIGBY. It is not accurate to say that he rules. He does not do that. His powers and duties in that regard are fixed by rule 103 of the Rules of Procedure, which is not long, and I might perhaps read it here.

Senator WARREN. You may do so.

Lieut. Col. RIGBY (reading):

POWERS AND DUTIES OF JUDGE ADVOCATE.

103. The powers and duties of a judge advocate are as follows:

(A) The prosecutor and the accused, respectively, are at all times, after the judge advocate is named to act on the court, entitled to his opinion on any question of law relative to the charge or trial, whether he is in or out of court, subject, when he is in court, to the permission of the court.

(B) At a court-martial he represents the judge advocate general.

(C) He is responsible for informing the court of any informality or irregularity in the proceedings. Whether consulted or not, he will inform the convening officer and the court of any informality or defect in the charge or in the constitution of the court, and will give his advice on any matter before the court.

(D) Any information or advice given to the court on any matter before the court will, if he or the court desire it, be entered in the proceedings.

(E) At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and give his opinion upon the legal bearing of the case before the court proceed to deliberate upon their finding.

(F) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not overrule it, except for very weighty reasons. The court are responsible for the legality of their decision, but they must consider the grave consequences which may result from their disregard of the advice of the judge advocate on any legal point. The court in following the opinion of the judge advocate on a legal point may record that they have decided in consequence of that opinion.

(G) The judge advocate has, equally with the president, the duty of taking care that the accused does not suffer any disadvantage in consequence of his position as such or of his ignorance or incapacity to examine or cross-examine witnesses or to make his own evidence clear or intelligible, or otherwise, and may for that purpose, with the permission of the court, call witnesses and put questions to witnesses which appear to him necessary or desirable to elicit the truth.

(H) In fulfilling his duties the judge advocate will be careful to maintain an entirely impartial position.

That defines his position, and it defines it, I think, fairly, as it actually is in practice.

Senator CHAMBERLAIN. That differs from our Judge Advocate General in that the practice as to the Judge Advocate General in our Army has grown to be that he is a man who represents the Government?

Lieut. Col. RIGBY. You said "Judge Advocate General," Senator. You meant the judge advocate.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. It does. Our judge advocate is expected to prosecute, and also to some extent to represent the accused. It is, of course, very difficult to hold those two positions fairly, balancing the two interests; and in reviewing the records of cases, one can not help but be struck by that. Some judge advocates go to one extreme and are too favorable to the accused, and others go to the other extreme and are practically prosecuters.

Senator CHAMBERLAIN. The grave consequence of that is that if a court disobeys the advice of the judge advocate in Great Britain he subjects himself to civil damages, does he not?

Lieut. Col. RIGBY. No; that is putting it a little stronger than it should be. The accurate way, I think, Senator, to state that, is, that in case an action for damages is brought, if the court is able to say that it did follow the advice of the judge advocate in acting as it did, that may, in a doubtful case, be a protection to them.

Senator CHAMBERLAIN. Otherwise, they incur the risk of a judgment?

Lieut. Col. RIGBY. That is, if they do not follow his advice, in that case, the failure to follow the advice is not anything one way or the other; whereas it may be a shield to them if they can show that they followed his advice.

Senator CHAMBERLAIN. Have you finished with that regulation?

Lieut. Col. RIGBY. I have finished with that.

Senator CHAMBERLAIN. Go right along.

Lieut. Col. RIGBY. As I see it, the difference between the judge advocate under that regulation, and the proposed trial judge advocate under Senate bill 64, is that the British judge advocate does not by his rulings bind the court at all. He is only an adviser to the court. While the court are to listen to his advice, and are cautioned not to overrule it except for very weighty reasons, still the power resides in the court, and not in the judge advocate; and a court, of course, composed wholly of army officers; so that, in the last analysis, it is the military men, the Army officers, who have the power, advised by the impartial lawyer attached to the court.

Furthermore, the British court imposes its own sentence, instead of simply making a finding and letting the judge advocate impose the sentence, as is proposed in Senate bill 64; and the British judge advocate has no power to in any way approve, or to approve only partly, or to disapprove, the finding of the court—has no jurisdiction similar to that of a reviewing authority, or of a civilian judge. He has no office of that kind, at all. And he has, of course, no power to impose sentence.

Then, the British judge advocate has no power to suspend or modify a sentence, such as is proposed to be given to the judge advocate by Senate bill 64.

Senator CHAMBERLAIN. They usually follow his advice, though, do they not?

Lieut. Col. RIGBY. Undoubtedly they usually follow his advice; but the decision lies with the military officers of the court and not with the lawyer who is the adviser. Pardon me, Senator, for interrupting you.

Senator CHAMBERLAIN. Before leaving that: Where is there lodged, anywhere in the military system of jurisprudence, the appeal jurisdiction? Is there anything——

Lieut. Col. RIGBY. You are speaking of the British system?

Senator CHAMBERLAIN. Yes; of the British system.

Lieut. Col. RIGBY. Nowhere; any more than with us; except that there is a practice which you might call, in effect, a kind of appellate jurisdiction. There is nowhere in the statutes or in the regulations any appellate jurisdiction provided for; but, in practice, petitions are entertained by the War Office, really at any time after a conviction. A man may petition, or his relatives or anybody may petition for him, and that petition, if it involves any legal questions, as it usually will, is turned over to the Judge Advocate General for examination; and, in that case, Judge Cassel says in his statement here that he will again review the record in the same way as if it were coming up as an original case, although he has reviewed it before; and will tender a recommendation, if he thinks one ought to be tendered, to the Sovereign, through the secretary of state for war.

Senator CHAMBERLAIN. Does that take in the general courts only, or does it take in the minor courts also?

Lieut. Col. RIGBY. Yes; any petition will be examined; and he has the power, because the Sovereign of England has the full power to quash; so that there is, in effect, a kind of appellate power there.

Senator CHAMBERLAIN. To quash or to modify?

Lieut. Col. RIGBY. Yes; to do anything with it.

Senator WARREN. How does the power of the commander in chief compare with that of the President of the United States to veto or quash and set aside, as they call it?

Lieut. Col. RIGBY. The power of the President of the United States is limited to clemency, after the sentence has once been finally approved, and confirmed, if confirmation be necessary.

Senator WARREN. To pardon?

Lieut. Col. RIGBY. To pardon.

Senator WARREN. Or to a partial reduction of the sentence?

Lieut. Col. RIGBY. Yes; whereas the British Sovereign may exercise, really, by what is called "quashal," an appellate power, and wipe the whole thing out.

Senator CHAMBERLAIN. Where is the appellate power under our system?

Lieut. Col. RIGBY. Of that kind, there is, of course, no appellate authority after the final confirmation of the judgment.

Senator CHAMBERLAIN. By the commanding officer?

Lieut. Col. RIGBY. By the commanding officer; if he has power to finally confirm, or by the department commander, or by the President, as the case may be, in those cases which require additional confirmation.

Senator CHAMBERLAIN. So that, as I understand it, there is really no appellate power vested in anyone, here, under our system?

Lieut Col. RIGBY. Not in the sense of a power exercised after the regular review is finished and the sentence has been finally approved and confirmed; and at the request or petition or appeal, if you please, of the accused. We have, under our reviewing powers and confirming powers, a system of what has been called automatic review, under which every general court-martial record is reviewed, and I may say carefully reviewed, by lawyers attached to the staff of the reviewing authority, and then in the office of the judge advocate general. But that is a different thing, perhaps, from what would be strictly called appellate power.

Senator CHAMBERLAIN. Does the judge advocate general, even after these cases have been reviewed, assume to exercise any power over the sentence except a revisory power, except in cases where there is an entire lack of jurisdiction, or there have been errors in the trial?

Lieut. Col. RIGBY. Of course where there has been entire lack of jurisdiction, we can recommend setting the proceedings aside, just as can the British judge advocate general, and in any case, so far as the judge advocate general is concerned, there is not much difference, really, between our judge advocate general and the British judge advocate general; because the British judge advocate general, like our judge advocate general, simply recommends and advises the Secretary of State for War, or the commanding general; just as our judge advocate general recommends to and advises the Secretary of War or the President, or the commanding general, as the case may be. I think really that our power is quit analogous, and its method of exercise is quite analogous, to that of the British judge advocate general, in the review. His powers are advisory, and ours are advisory. I have submitted to you the forms of the minutes that they use. They are in the shape of recommendations. Ours are recommendations. The Secretary of State for War in Great Britain

is not bound to follow the recommendations of the judge advocate general. The Secretary of War, the President, and the commanding general, as the case may be, are not bound to follow the recommendations of our judge advocate general.

Senator CHAMBERLAIN. They usually do in both countries?

Lieut. Col. RIGBY. They usually do in both countries, and there is usually not much difference between the percentages in which they follow them in the two countries. Perhaps the percentage is a little higher there, but it is almost unanimous with us.

I made some investigations as to those figures last winter, at the direction of the Judge Advocate General; and, as I remember it, it ran that something about 98 per cent of the recommendations of the Judge Advocate General for reversal or modification—anything of that kind—had been followed, both by the Secretary of War and the commanding generals, with us. I do not want to attempt to speak accurately, but it is around about that figure. Practically always, they follow the recommendations.

Senator CHAMBERLAIN. You were going to illustrate the proceedings over there by the progress of a case, from step to step.

Lieut. Col. RIGBY. Yes; and speaking of the general court in the field—because in the field and at war the general court is a thing that was but little used—I would rather use the field general court, which is the court that is used very largely. It is the usual trial court for the Army outside of the United Kingdom, in time of war. The field court has all of the powers of the regular general court. It is appointed in instances where the officer with the power to convene a general court finds that it is not practicable to appoint a full general court; and, therefore, he appoints a field court. The field court may consist of any number of officers, from three (3) up. It usually consisted, during the late war, of three (3) and sometimes of five (5). In emergency it might have but two members, but then it could not impose death nor penal servitude.

Senator CHAMBERLAIN. All commissioned officers?

Lieut. Col. RIGBY. All commissioned officers. Since September, 1916, they got into the habit of attaching to the field courts an additional member whom they called the "specially qualified member," who was a lawyer, and was a member of a body of officers which they created in September, 1916—lawyers, called "court-martial officers."

Senator CHAMBERLAIN. They were independent of the judge advocate that accompanied the field court?

Lieut. Col. RIGBY. No judge advocate accompanies the field court at all, Senator; and it was to fill that gap in serious and difficult and complicated cases that this habit grew up of appointing an additional member of the court. So that, during the latter part of the war, when a general appointed a field court of, say, three officers, he would also appoint a fourth member, an officer who was a court-martial officer—that is, a lawyer. These court-martial officers were appointed under a circular. I think I have a copy of that little circular here. It is a war office letter. That was issued in September, 1916, by the war office.

Senator CHAMBERLAIN. You can just insert that in the record.

Senator WARREN. Yes.

Lieut. Col. RIGBY. I wanted to find it, if I could.

Senator WARREN. It is just a general order?

Lieut. Col. RIGBY. It is, in effect, a general order. It is what they call a "War Office Letter of Instruction"; but it is the same thing as a general order of our War Department.

Senator WARREN. If you have it, you may insert it later.

Lieut. Col. RIGBY. Yes; I have it, and will read it in a few moments. But under that order this corps of court-martial officers was established, and as it finally came into practice, perhaps after some little time in practice, they attached two of those officers, as a rule, to every division. They would use one of them as a staff judge advocate and use the other one as this additional member of the field court.

Senator CHAMBERLAIN. Were they civilians?

Lieut. Col. RIGBY. They were appointed from civil life, just in about the same way that our temporary judge advocates were appointed to the Judge Advocate General's department.

Senator WARREN. But they were commissioned?

Lieut. Col. RIGBY. They were commissioned and were given field rank usually. They used them at home, also, by the way, as presidents of district courts-martial, and as general legal advisers to the commanding generals. In a division there would be appointed, as with us, quite a number of field courts—their field courts corresponding to our general courts in active service at the front. Then one court-martial officer would be appointed as the additional member of each of those field courts within that division. He was not required, and was not expected, to be present at every session of each court of which he was a member; but the regulations, which were finally, after some fluctuation, compiled in a "circular memorandum" gotten out August 1, 1918, provided that no case of a serious, difficult, or complicated nature should be tried without the presence of that "specially qualified member" of the court, the court-martial officer; but the little ordinary cases of absence without leave and the ordinary run of little stuff the court would try without his presence.

The commanding general—the convening authority, of course usually advised by his staff judge advocate in practice—directed what cases this "specially qualified member" should sit in at and should attend. I have, for instance, in my files, a telegram—that shows the way it was generally done—received by the court-martial officer in the Cologne district, directing him to be present on such and such a day at such and such a town for the trial of a case.

Senator CHAMBERLAIN. Did those courts try enlisted men?

Lieut. Col. RIGBY. They tried enlisted men and officers.

Senator CHAMBERLAIN. It was practically the only court?

Lieut. Col. RIGBY. Not quite that; but it was the court that tried a great deal more than a big majority of the cases during the war, outside of the United Kingdom. There were some general courts convened in France, but not very many.

Now, at trials where that additional member was present, the regulations provided that he should advise the court on legal questions, in the same manner and with the same effect as their judge advocate at their general courts.

Senator CHAMBERLAIN. Under rule 103?

Lieut. Col. RIGBY. Under rule of procedure 103; so that he acted in a dual capacity. He was an ordinary member of the court and voted as a member of the court, but on legal questions he advised the court, the other members being free, under rule 103, to follow his advice or not, but being warned not to disregard his advice on a legal point except for weighty reasons.

Senator CHAMBERLAIN. The others being lawyers or not?

Lieut. Col. RIGBY. Probably not. They were Army officers.

Now, that system is said to have worked very well. You will see, in looking over Judge Cassel's statement, that they think very highly of it; and Judge Cassel expected to recommend it to their court-martial committee as a thing to be adopted as a permanent thing in the British Army. The "specially qualified member" of the court acted exactly the same as their judge advocate, except that he did not sum up in open court. Being a member of the court, that would seem unnecessary, and as a matter of practice he did not do it. I think, balancing between the two plans of the judge advocate who is not a member of the court and of the "specially qualified member" who is a member of the court, Judge Cassel is rather inclined to favor the plan of the judge advocate not a member of the court.

You will see in the statement that Judge Cassel makes that he recognizes that some arguments can be made on both sides; but, balancing them, his mind inclines rather that way, that is, toward the judge advocate. But, in any event, as to the plan of having this body of court-martial officers attached to the Army, they say it has worked well in practice; and it seems to be the opinion of officers, practically the opinion of every one that I have talked with, that it ought to be in some way or other perpetuated and made a permanent part of their military system. Was there something further on that?

Senator CHAMBERLAIN. No; I think not.

Senator WARREN. If you have come to a pause, let me ask you this: Take these Army officers that are educated at West Point; what, if any, law course do they take?

Lieut. Col. RIGBY. Of course, I have no personal knowledge of that.

Senator WARREN. Perhaps I might put the question in another way. Is there an appreciable difference, in your judgment, as shown in these trials, in the knowledge of law of officers who have been graduated from West Point and of those who have gone in from civil life?

Lieut. Col. RIGBY. I should not say, Senator, that I could discern, in reading the records, any difference as to knowledge of law. I think it is fair to say that one can see something of a difference as to the mental attitude, one might say the sureness with which they sit in the saddle. In other words, as it seems to me, a good many of the judges in courts-martial without experience are not very sure of themselves, and are a little inclined—well, to put it that way, to "pass the buck." I have in mind a particular case that I remember when I was reviewing officers' cases, where an officer was charged with being absent without leave. I think he was gone five or six days. The circumstances were that he was directed to be away for a day or two. He was just reporting, and they had not quarters for him and sent him away temporarily, and he was taken down with the

"flu"—it was while there was that epidemic of "flu"—and was sick in bed. He was sick, I suppose, was the reason, but, at any rate, he did not take the trouble to have anybody telephone, and no report was made of the cause of his absence, and he came back five or six days late. He was charged with absence without leave, and was tried. The court, of course, could have given him any sentence, from a reprimand up. They gave him the heaviest sentence possible, dismissal from the Army; and then turned around, and every one of them joined in a recommendation of clemency. Now, the only way that I could understand that at all, was that those men simply did not know what ought to be done, and they were giving the heaviest sentence possible, thinking it could then be cut down to what was right, forgetting that it had to go clear up to the President, through all the machinery.

Senator WARREN. There is nothing in the law requiring that kind of a sentence?

Lieut. Col. RIGBY. Nothing at all. It was simply one of those foolish sentences, because the men did not know what to do.

Senator WARREN. Another question along the same line: Have you observed, in the course of your service, differences as to severity or leniency in the courts predominated over by those fresh from civil life and those in the Army—those longer experienced, perhaps?

Lieut. Col. RIGBY. No; unless one could deduce that from the statistics. It is pretty hard to tell; but it is true that for one reason or another during the progress of the war the sentences were getting heavier, and, of course, it is also true that the number of Regular Army officers sitting on the courts was necessarily progressively getting smaller in proportion as the Army increased in numbers. Now, whether those two things are connected, and how far they may be connected, I would not have any way of judging.

Senator WARREN. Another question: In selecting the court, it may or may not have been in the mind of the commanding officer to have a part of the court made up of experienced officers and the rest from civilian life. Were the courts generally made up of both elements, or was there an absence of such intent, and were the courts made up just as they happened to be?

Lieut. Col. RIGBY. I could not answer that question, except from general observation.

Senator WARREN. That is what I want.

Lieut. Col. RIGBY. It seemed to me, from what I could observe, that in the earlier part of the war that was true. Of course, later on most of the regular men were overseas, and the courts here at home were necessarily made up almost exclusively of temporary officers. My own experience in reviewing records has been on this side. I have not reviewed any records overseas, so that I would not be able to know how that was after they got over there.

Senator WARREN. They are all here now.

Lieut. Col. RIGBY. Yes; they are all here now, and of course during the latter part of last year, during the time I was reviewing records here at home, there were very few Regular Army officers here at all to put on the courts.

I was going, then to pass to the French system as to the composition of the court, unless there was something further on the British system.

Senator CHAMBERLAIN. Before you pass from that: The records of all these general courts were made by stenographic reports?

Lieut. Col. RIGBY. Of the general courts, yes, sir. And, by the the way, I have, if it should interest you, copies of quite a number of records that were given to me by the British Judge Advocate General's office and others, as samples of the way they do it.

Senator CHAMBERLAIN. Do you have printed records?

Lieut. Col. RIGBY. No, sir; they are typewritten. I forgot a little what I was going to do with them. I was going to trace the history of a field general court case for you.

Senator CHAMBERLAIN. Yes.

Lieut. Col. RIGBY. I have, for instance, here, a printed verbatim copy of two field general court records. These happen both to be cases—both of them are actual cases—that were presented in the course of the testimony before the British Court-Martial Committee, and this particular document has been released by Judge Cassel from the confidential status, so that I am permitted to show it to you.

Senator CHAMBERLAIN. Why could we not put that into the record?

Lieut. Col. RIGBY. That could go right in the record; that shows just how they do it.

Senator CHAMBERLAIN. If it is released from confidence, we would like to have it go in the record.

Senator WARREN. Let it be inserted here.

(The document referred to is here printed in full in the record, as follows:)

FORM FOR ASSEMBLY AND PROCEEDINGS OF FIELD GENERAL COURT-MARTIAL (A).

PROCEEDINGS.

At Chateau Combreux, Tournan, this 6th day of September, 1914. [If troops are on active service.]

Whereas it appears to me, the undersigned, an officer in command of —— Army Corps, on active service, that the person named in the annexed schedule, and being subject to military law, has committed the offenses in the said schedule mentioned.

And I am of opinion that it is not practicable that such offenses should be tried by an ordinary general court-martial.

I hereby convene a field general court-martial to try the said person, and to consist of Col. J. K., president, O. C. —— Army Corps troops; Capt. L. M., —— Regiment; Lieut. N. O., —— Regiment.

(Signed) H. L. SMITH-DORRIEN,
General Commanding —— Army Corps.

First witness, C. D., being duly sworn, states: At Tournan on 6th September, 1914, about 8.15 a. m., I was in search of my bicycle which I had lost; and from information received I went toward the Medlin and found there the accused here present before the court, dressed in civilian clothes. I asked him what he was doing, he answered "I have lost my Army and I mean to get out of it," or words to that effect. I asked him where his clothes were and what regiment he belonged to. He said, "the —— Regiment." I searched him and found on him the book which I produce. I conducted him to the place where he thought he had left his clothes, rifle, and cartridges. We found his clothes in a woodshed, the rifle and cartridges were missing. I took him to the Mairie and gave him up to the French police. I also produce his uniform, which is marked ———, —— Regiment.

Question by the accused: Did I say I wanted to get out of it, or, that I wanted to find my way out of it?—A. He said "I have had enough of it, I want to get out of it, and this is how I am doing it."

The accused declines to further cross-examine this witness, who withdraws.

Second witness, Captain E. F., —— Regiment, being duly sworn, states:—When I arrived at Chateau Combreux, near Tournan, on the morning of the 6th September, 1914, I received a telegram (which I produce) and an order to go to the farm of Mons. ———, Rue du ———, Tournan, and arrest a deserter. I obeyed and then went to the Mairie, and was given the uniform and Active Service pay-book of Private A. B., ——— Regiment. The uniform was marked with his number. I took over the man and handed him to the Provost-Marshal. The man, the accused here present, was dressed in plain clothes, just as he is now, as well as I can remember, or perhaps he had a coat on. I asked him why he had run away. He answered that he left his bivouac this morning and remembered nothing more.

The accused declines to cross-examine this witness, who withdraws.

The prosecution is closed.

The accused, No. ———, Private A. B., —— Regiment, has no witnesses to call, but elects to give evidence on oath, and states after being duly sworn: I came out of bivouac with my regiment this morning; we halted on the side of the road. I fell out on the right to ease myself. The regiment went on before I was finished. I went on, but could not find them; got strolling about; went down into a farm, lay down in an empty house, and have a slight remembrance of putting some civilian clothes on, but do not remember exactly what happened until the man came down to arrest me. I was coming back then to see if I could find my clothes and my regiment, but I was taken to the police station before I could get back. When I was asked by the man who arrested me who I was I answered him at once and told him who I was.

Cross-examined by the prosecutor (A. P. M., —— Army):

Q. Why did you say to C. D. you "wanted to get out of it and that was how you were doing it," or words to that effect?—A. When he came to me I told him that I was trying to get out of it, meaning that I had lost my way—wanted to get out of the place in which I was and wanted to rejoin my regiment. I can not say why I was in civilian clothes.

The court is cleared.

COPY OF TELEGRAM PRODUCED BY C. F.

Civilian reports an English deserter in plain clothes at the farm of M. ———, Rue du ———, Tournan. Can you deal?

(Signed) R. C. G.

Exhibit II, the A. B. 64 of the accused is attached to the proceedings.

I certify that the above court assembled on the 6th day of September, 1914, and duly tried the person named in the said schedule, and that the plea, finding, and sentence in the case of such person as stated in the third and fourth columns of that schedule.

Signed this 6th day of September, 1914.

J. K.,
Colonel, O. C. —— Army Corps Troops,
President of the Court-Martial.

I have dealt with the findings and sentences in the manner stated in the last column of the above schedule, and, subject to what I have there stated, I hereby confirm the above findings and sentences; and I am of opinion, with reference to the sentences of summary punishment mentioned in the schedule, that imprisonment can not, with due regard to the public service, be carried into execution.

(And I am of opinion that it is not practicable, having due regard to the public service, to delay the cases for confirmation by any superior qualified authority.)

Signed this —— day of ——— 19—.

H. L. SMITH-DORRIEN,
General, Commanding —— Corps.

COURTS-MARTIAL.—FORM OF DECLARATION OF MILITARY EXIGENCIES OR THE NECESSITIES OF DISCIPLINE UNDER RULE OF PROCEDURE 104.

In my opinion [military exigencies, namely] proximity of the enemy render it inexpedient to observe the provisions of rules 4 (C), (D), and (E) 5, 8.

13, 14, on the trial of No. —— Private A. B., —— Regiment, by field general court-martial assembled pursuant of my order of the 6th of September, 1914.

Signed at Tournan, this 6th day of September, 1914.

H. L. SMITH-DORRIEN,
General, Commanding —— Army Corps.

Subject to what I have stated in the last column of the schedule, I hereby confirm the sentence of death in the case of No. ——, Private A. B., —— Regiment.

Signed this 6th day of September, 1914.

J. D. P. FRENCH, *Field Marshal.*

Schedule.

Name of alleged offender.	Offense charged.	Plea.	Finding, and if convicted, sentence.	How dealt with by confirming officer.
No. ——, Private A. B., —— Regt.	When on active service, deserting His Majesty's service.	Not guilty	Guilty. To suffer death by being shot.	Confirmed. J. D. P. FRENCH, *Field Marshal,* *Commander-in-Chief.*

H. L. SMITH-DORRIEN,
General, Commanding —— Corps.

Sentence executed at 7.7 a. m. on the 8th September, 1914.

J. C. MONTEITH,
Captain, A. P. M., —— Division.
7.15 a. m., 8.9.14.

H. L. SMITH-DORRIEN, *General, Commanding —— Army Corps, Convening Officer.*

J. K., *Colonel, Commanding —— Army Corps Troops, President.*

MEDICAL CERTIFICATE.

I have this day examined No. ——, Private A. B., —— Regiment, and find him in sound mental and bodily health, fit to undergo imprisonment with or without hard labor.

E. L. Moss,
Captain, R. A. M. C.

6th September, 1914.

M. O. Headquarters, —— Army Corps, Chateau Cambreux.

J. K., *Colonel,*
Commanding —— Army Corps Troops,
President, F. G. C.-M.

—— CORPS.

A. 483, 8.9.14. I have to inform you that the sentence on Private A. B., —— Regiment, was carried out at 7.7 a. m. this morning. Certificate from the Provost-Marshal, who carried out the sentence, is attached, and the proceedings of the F. G. C.-M. are also returned herewith.

W. H. ANDERSON. *Lieut. Colonel.*
A. A. and Q. M. G.

—— Division. 10.20 p. m., 8.9.19. Kindly acknowledge safe receipt.

HEADQUARTERS, —— DIVISION.

In accordance with orders I have the honor to state that I interviewed Headquarters, —— Infantry Brigade, and in the presence of the C. of E. clergyman, I read out the sentence of death to Private A. B., —— Regiment, at 6.22 a. m., on the 8th September, 1914. I arranged place of burial. Firing and burial parties were found by O. C., —— Regiment.

In the presence of one company of the —— and the —— Regiments, I promulgated and carried the sentence into effect at 7.7 a. m. Death was instantaneous.

J. C. MONTEITH, *Captain.*
A. P. M., —— Division.

7.15 a. m., 8.9.14.

PROVOST MARSHAL.

A. 472. Reference carrying out of death sentence on Private A. B., ——— Regiment.

(1) Explain to G. O. C., ——— Brigade, that he is asked to arrange, as this Brigade Group is marching last.
(2) Prisoner to be given about three-quarters of an hour—after he is informed of sentence—with a clergyman.
(3) Burying party can remain behind.
(4) Carrying out of sentence to be as public as convenient.
(5) Certificate that sentence has been carried out.

V. W., *Lieut. Colonel,*
A. A. and Q. M. G.
A 2

5.10 a. m., 8.9.14.

BRIGADIER GENERAL,
—— *Infantry Brigade.*

A. 471, September 8. The proceedings of F. G. C.-M. on Pvt. A. B., —— Regiment, are forwarded herewith. The lieutenant general would like you to arrange for the death sentence to be promulgated and carried out at once, as publicly as convenient. The proceedings herewith to be returned.

W. H. ANDERSON, *Lieut. Colonel,*
A. A. and Q. M. G., —— Division.

COULOMMIERS, *5 a. m., 8.9.14.*
To The ADJUTANT GENERAL, G. H. Q.
B. 145, —— Corps.

I submit the proceedings of a F. G. C.-M. on No. 00000, Private A. B., of the —— Regiment, for desertion in the face of the enemy for confirmation by the commander in chief.

H. L. SMITH-DORRIEN, *General,*
Commanding —— Corps.

6th September, 1914.

Herewith the proceedings of the F. G. C.-M. and certificate of sentence carried out, on Private A. B., —— Regiment.

GRANVILLE SMITH, *Colonel and Q. M. G.,*
for G. O. C. —— Army Corps.

9th September, 1914.

B.
This will be promulgated in Army Orders.
J. A. G.
Passed to you, the necessary extracts having been taken.

B. W. CHILDS, *Major, D. A. A. G.*

G. H. Q., *9.9.14.*

D. J. A.
Forwarded. Word "confirmed" has been added.

GRANVILLE-SMITH, *Colonel,*
for D. A. Q. M. G., —— Army Corps.

28th September, 1914.

ADJUTANT GENERAL,
General Headquarters, London.

A. G's. CM./2880 of 3.11.18.
The proceedings of F. G. C.-M. in the case of No. ———, Private A. B., —— Regiment, are returned herewith as requested.
A certificate that the finding and sentence have been promulgated has been entered on page 3 of A. F. A. 3.

F. B. MERRIMAN, *Major, D. A. A. G.,*
for General Commanding —— Army.

H. Q., —— ARMY, *15.11.18.*

132265—19—PT 5——3

—— ARMY A.

With reference to your CM./15055, of 4.11.18, Proceedings of F. G. C.-M., in the case of No. ———, Private A. B., —— Regiment, are returned herewith, the sentence having been carried out on 7.11.18.

J. W. OLDFIELD, *Major*,
for Major General Commanding —— Corps.

13.11.18.

—— CORPS A.

Proceedings of field general court-martial in the case of No. ———, Private A. B., —— Regiment, are returned herewith.

The sentence was carried out on the 7th inst.

A. E. J. WILSON, *Lieut. Colonel*,
for Major General Commanding —— Division.

11.11.18.

DEATH CERTIFICATE.

I certify that No. ———, Private A. B., —— Regiment, was executed by shooting at ——— on November 7, 1918, at 6.29 a. m. Death was instantaneous.

H. W. BARBER, *Captain, R. A. M. C.*

D. A. P. M.,
—— *Division.*

The commander in chief has ordered that the sentence of death in the case of No. ———, Private A. B., —— Regiment, be put into execution.

The sentence will be carried out at dawn on November 7, 1918.

P. R. ROBERTSON, *Major General*,
Commanding —— Division.

6.11.18.

—— DIVISION.

For information and necessary action.

Proceedings to be returned to this office after promulgation.

J. W. OLDFIELD, *Major*,
D. A. A. G. —— Corps.

4.11.18.

—— ARMY, CM. 15055.

—— CORPS A.

1. The proceedings of field general court-martial held for the trial of No. ———, Private A. B., —— Regiment, are forwarded herewith for necessary action, the commander in chief having confirmed the sentence of death.

2. Please have the instructions contained on page 26 of Circular Memorandum on Courts-Martial, S. S. 412B, Part III, para. 68, complied with and the proceedings returned to this office after promulgation.

3. —— Division have been notified direct by wire.

F. B. MERRIMAN, *Major*,
D. A. A. G., —— Army.

H. Q., —— ARMY, *4.11.18.*

GENERAL OFFICER COMMANDING, —— ARMY.

In confirmation of my telegram No. A (b) 3 of to-day.

Please note that the commander in chief has confirmed the sentence in the case of No. ———, Private A. B., —— Regiment.

The return of the proceedings direct to this office after promulgation is requested.

R. T. KINNER WILLIAMS, *Captain*,
for Adjutant General.

G. H. Q., *8.11.18.*

——— ARMY, CM. 15055.

ADJUTANT GENERAL,
General Headquarters.
(Through Deputy Judge Advocate General.)

Proceedings of Field General Court-martial, held for the trial of No. 00000, Private A. B., ——— Regiment, are forwarded herewith.

I recommend that the sentence be put into execution. A very bad case.

J. BYNG, *General*,
Commanding ——— Army.

H.Q. ——— ARMY, *30.10.18.*

A. G.
For submission to the Commander in Chief.

R. P. HILLS, *Major*,
for D. J. A. G.

30.10.18.

——— ARMY, A.
Forwarded.
I recommend that the sentence be carried out. The crime was deliberate and no excuse is possible.

C. D. SHUTE, *Lieut. General*,
Commanding ——— Corps.

29.10.18

——— CORPS.
Reference proceedings of F. G. C.-M. herewith attached, on No. 00000, Private A. B., ——— Regiment. I consider that the crime was deliberately committed, and can find no extenuating circumstances in the case, further than that the accused has served in France for more than two years. I recommend that the extreme penalty be carried out.

P. R. ROBERTSON, *Major General*,
Commanding ——— Division.

B. E. F., *26.10.18.*

——— DIVISION, A.
Reference attached A. F. A. 3, in the case of No. 00000, Private A. B., ——— Regiment.
Private A. B. is being handed over by O. C. ——— Division Reception Camp, to A. P. M., *vide* attached copy of ——— Division A. R. 199 of 22.10.18.
Private A. B. has served continuously in the B. E. F., 16.7.16.
I. Commanding officer's opinion of character from a fighting point of view. Attached, marked "A."
II. Discipline of battalion. Very good.
III. Commanding officer's opinion as to deliberate nature of crime. Attached marked "B."
IV. I recommend that the extreme penalty be carried out for the following reasons:
(*a*) Private A. B.'s action was deliberate.
(*b*) He has previously attempted to desert unsuccessfully. See C. O.'s remark, 25.10.18.
(*c*) He is worthless as a soldier.
(*d*) During an action he deliberately abandoned his comrades.
(*e*) His example is a disgraceful one.

J. M. HOPE, *Brigadier-General*,
Commanding ——— Infantry Brigade.

24.10.18.

To ——— Infantry Brigade.
Reference my previous memo. My reason for stating Private A. B.'s desertion was deliberate is, that this was the second occasion within two days, that Private A. B. had come away from the line without permission. Two days prior to the date on which he was charged, he had made his way back to ——— Echelon without permission and been sent up by the quartermaster. This, together with the man's record, induced me to form the opinion I have already stated.

W. GIBSON, *Lieut. Colonel*,
Commanding ——— Regiment.

25.10.18.
(Signed) J. M. HOPE,
Brigadier General, Commanding ——— Infantry Brigade,
Convening Officer.

(Signed) Z. A., *Major, President.*

"A"

—— Regt. 60.
To ——— Infantry Brigade.
Reference S. C. 99, of 20.10.18.

I. No. ———, Private A. B. has not got a good record in this battalion. His fighting value is nil.

III. I have very little knowledge of this man, but I have questioned several officers, and in their opinion his deserting was deliberate. When I remanded him for court-martial I considered his case one of deliberate desertion. I am still of that opinion.

W. GIBSON,
Lieutenant Colonel, Commanding ——— Regiment.

23.10.18.

Certified that No. ———, Private A. B., ——— Regiment, has been taken over by me to-day.

J. E. HOLDSWORTH,
Captain, D. A. P. M., ——— Division.

25.10.18.

FORM FOR ASSEMBLY AND PROCEEDINGS OF FIELD GENERAL COURT-MARTIAL ON ACTIVE SERVICE.

PROCEEDINGS.

On active service, this 6th day of October, 1918.

Whereas it appears to me, the undersigned, an officer in command of ——— Infantry Brigade, on active service, that the person named in the annexed schedule, being subject to military law, has committed the offense in the said schedule mentioned.

And whereas I am of the opinion that it is not practicable that such offense should be tried by an ordinary general court-martial.

I hereby convene a field general court-martial to try the said person, and to consist of the officers hereunder named.

Maj. Z. A., —— Regiment, president.
Capt. V. M., —— Regiment.
Capt. B. C., C. M. O., —— Corps, H. Q.

(Signed) J. M. HOPE,
Brigadier General, Commanding —— Infantry Brigade, Convening Officer.

Schedule.

Number, rank, name, and unit of accused.	Offense charged.	Plea.	Finding and, if convicted, sentence.	How dealt with by confirming officer.
No. ——, Private A. B., — Regiment.	AA, section 4 (7): "Misbehaving before the enemy in such a manner as to show cowardice."	Not guilty.	Not guilty.	
	Alternative charge.			
	AA, section 12 (1): "Deserting His Majesty's service."	Not guilty.	Guilty. Death. Opinion unanimous.	Reserved. J. M. HOPE, Brigadier General, commanding — Infantry Brigade. Confirmed. D. HAIG, Field Marshal. 3d November, 1918.

TRIAL OF No. ———, PRIVATE A. B., ——— REGIMENT.

Prosecutor: Captain D. E., ——— Regiment.
Accused's friend: Lieutenant F. G., ——— Regiment.

PROSECUTION.

First witness, No. ———, Sergeant H. I., ——— Regiment, sworn, states:

On the night of the 2d September, 1918, the battalion was preparing to make an attack from ——— on ———. The accused was present at the assembly point. On reaching our objective, I called the roll and the accused was absent. I did not see the accused again until he was brought up at orderly room at ———. I can not remember the date; it was about seven or eight days later, I think. The battalion made the attack on ———.

Not cross-examined.

Not cross-examined by the court.

R. P. 83 (6) complied with.

Second witness, No. ———, Private J. K., ——— Regiment, sworn, states:

On the night of the 2d September, 1918, during the advance from ——— to ———, I was in charge of a Lewis gun team. The accused was attached to my gun team. During the advance we halted a short while in some shell holes. There the accused dumped his haversack, mess tin, and oil sheet. We got the order to take our final objective, but the accused hung back. On reaching our final objective, the accused was missing. I never saw him again until he was before the colonel. I should think it was about three weeks after. The accused was never with my team from the time he went away. There was practically no opposition to our advance. There were only a few German patrols knocking about. We took one prisoner. There was no firing on us whatever.

Cross-examined.—I did not speak to accused when he dumped his kit.

Not cross-examined.

Not cross-examined by the court.

R. P. 83 (6) complied with.

Third witness, Lieutenant L. M., ——— Regiment, sworn, states:

At 11 a. m. on the 3d September, 1918, I was at ———, echelon of my battalion at ———. I saw the accused. I asked him what he was doing there; in consequence of his reply I placed him under arrest.

Not cross-examined.

Not cross-examined by the court.

R. P. 83 (6) complied with.

DEFENSE.

The accused declines to make any statement in his defense.

AFTER FINDING.

The prosecutor, Captain D. E., ——— Regiment, duly sworn, states:

I produce certified true copy of A. F. B. 122, relating to the accused.

(Copy marked X, signed by president and attached hereto.)

Not cross-examined.

The accused calls no witnesses to character.

The accused in mitigation of punishment, states:

I joined the Army in early 1915. I was discharged in England as unfit. I rejoined the Army in the beginning of 1916. I came out in March, 1916. I have served in this country since 1916. I am 23 years old. Not married.

Sheet No. 1.

No. 00000. Sqn., batty., or company: B. Date of enlistment: 11. 4. 16. Service or proficiency pay:
Name: A. B. Corps: —— Regiment. G. C. Badges: Character:
Date of last entry in company conduct sheet } No. and date of last drunk } Period not reckoning towards freedom from extra fine } Signature O. C. company, etc. } G. R. Baines, *Captain.*

Place.	Date of offense.	Rank.	Cases of Drunkenness.	Offense.	Names of Witnesses.	Punishment awarded.	Date of award or of order dispensing with trial.	By whom awarded.	Remarks.
——	5. 6. 16.....	Pte.....	.....	Very untidy on parade when been warned.	C. S. M. A.....	7 days' C. B.....	5. 6. 16.....	Capt. N. O....	N. O.
——	15. 6. 16....	.....	.....	Improperly dressed on parade.....	C. S. M. A..... Verified, Certified correct,	3 days' C. B..... 24. 6. 16, R. S., *Capt.* B. C., *Capt.*, 4. 7. 16.	15. 6. 16.....	Capt. N. O....	N. O.
O. A. S....	10. 9. 16....	Pte.....	Nil.....	Not complying with battalion orders....	2nd Lt. B.....	4 days' C. C.....	11. 9. 16.....	Capt. C.....	
In the field	25–26. 1. 18.	Pte.....	.....	When on active service—not alert at his post while on brigade headquarters guard.	Documentary.....	28 days' F. P. No. 1	6. 3. 18.....	Lt.-Col. D.....	A. Z.
"	4. 6. 18.....	.....	.....	When on active service absenting himself from his company from 3.30 p. m., 4. 6. 18, until surrendering himself to the brigade guard 8.10 p. m., 4. 6. 18 (absent 4 hours 40 minutes).	L.-Cpl. E..... Cpl. G. Cpl. H. Documentary.	25 days' F. P. No. 1	25. 6. 18.....	Major F.....	

Certified true copy.—A. J. Brown, *Lieutenant, Adjutant —— Regiment.*

Sheet No. 2.

No. 00000. Sqn., batty., or company: B. Date of enlistment: 2. 3. 16. Service or proficiency pay:
Name: A. B. Corps —— Regiment. G. C. Badges: Character:
Date of last entry in company conduct sheet } No. and date of last drunk } Period not reckoning towards freedom from extra fine } Signature O. C. company, etc. } F. H. R. Law, *Lieutenant.*

Place.	Date of offense.	Rank.	Cases of Drunkenness.	Offense.	Names of Witnesses.	Punishment awarded.	Date of award or of order dispensing with trial.	By whom awarded.	Remarks.
In the field	10. 9. 16....	Pte.....	.....	When on active service—improper conduct.	2nd Lt. E.....	4 days' C. C.....	11. 9. 16.....	Capt. B. A....	D. E.
"	18. 9. 16....	Pte.....	.....	When on active service—not complying with an order.	L. Cpl. Y..... Pte H. Lt. F. G. Sgt. J.	14 days' F. P. No. 1	17. 9. 16.....	Lt.-Col. G.....	D. E.
"	13. 10. 16...	Pte.....	.....	When on active service—refusing to obey an order.	L.-Cpl. L..... L.-Cpl. M. Pte. T. Pte. S.	7 days' C. C.....	14. 10. 16.....	Capt. B. A....	D. E.
"	29. 10. 16...	Pte.....	.....	When on active service—absent from the trenches.	Sgt. U..... C. S. M. R. Sgt. Q.	5 days' F. P. No. 1.	4. 11. 16.....	Lt.-Col. W....	D. E.
"	14. 11. 16...	Pte.....	.....	When on active service—refusing to obey an order.	Sgt. X..... Pte. V.	5 days' C. C.....	15. 11. 16.....	Lt. Z.....	D. E.
"	15. 11. 16...	Pte.....	.....	When on active service—disobeying a lawful command given by his superior officer.	Sgt. Y..... L.-Sgt. A. C. S. M. J. Sgt. O.	3 months' F. P. No. 1.	21. 11. 16.....	P., G. C. M...	B. W.
"	25. 12. 16...	Pte.....	.....	When on active service—losing by neglect his trench waders.	Cpl. U.....	5 days' F. P. No. 1, ordered to pay one-third value of the trench waders.	27. 1216.....	Major N.....	F. G.
"	11. 9. 17....	Pte.....	.....	Whilst on active service—unshaven on 7.30 a. m. parade.	Sgt. K.....	3 days' C. C.....	11. 9. 17.....	Capt. Y.....	H. I.

× A. F. G. Anderson, *Major.*

Certified true copy.—A. J. Brown, *Lieutenant, Adjutant —— Regiment.*

I certify that the above court assembled on the 19th day of October, 1918, and duly tried the persons named in the schedule, and that the plea, finding, and sentence in the case of each such person were as stated in the third and fourth columns of that schedule.

I also certify that (1) the members of the court, (2) the witnesses, were duly sworn.

A. F. W. 3996 has been handed to the accused by me.

S. S. 412 (*b*) was before the court.

Signed this 19th day of October, 1918.

Z. A.,
Major, President of the Court-Martial.

I have dealt with the findings and sentences in the manner stated in the last column of the Schedule, and, subject to what I have there stated, I hereby confirm the above findings and sentences.

Signed this 25th day of October, 1918.

J. M. HOPE,
Brigadier General, Commanding ——— Infantry Brigade,
Confirming Officer.

Promulgated and extracts taken in the case of No. ——, Private A. B., ——— Regiment.

(Dated) 6–11–18 at 7.45 p. m.

(Signed) J. E. HOLDSWORTH,
Captain, D. A. P. M., ——— Division.

Sentence duly carried out at ——— at 6.29 a. m. on 7–11–18.

(Signed) J. E. HOLDSWORTH,
Captain, D. A. P. M., ——— Division.

Extracts taken 9–11–18.

W. GIBSON,
9–4–18. *Lieut Col., Commanding —— Regiment.*

Lieut. Col. RIGBY. I also have now, and want to put in, if I may, this war office letter of September, 1916, creating the body of court-martial officers. It is war office letter No. 1852, entitled "Officers attached to certain formations for duty in connection with courts-martial, etc." And also a table prepared in the office of the British Judge Advocate General, showing the normal progress of a case through their different courts-martial.

Senator WARREN. Let that go in.

(The letter and table referred to are here printed in full in the record as follows:)

1852.—*Officers attached to certain formations for duty in connection with courts-martial, etc.:*

1. Approval has been given for the attachment to the staff of certain formations of an officer for duty in connection with courts-martial. List of formations printed as Appendix 159 to these Instructions.

2. The appointments are of a temporary nature and the officers appointed will be seconded from their units and will receive extra-duty pay at the rate of 2s. per diem.

3. The duties of this officer, who should be a barrister or solicitor and well acquainted with military law, will be to assist and advise the commander of the formation, to which he is attached, on all matters in connection with courts-martial, including the reviewing of the proceedings, as also any other questions of military law which may arise. When a court-martial is being convened in a case which appears to present unusual difficulty, the officer attached for court-martial duties may, if available, be detailed as a member of the court.

4. It is to be distinctly understood that this officer is not a staff officer and is not entitled to wear staff distinctions.

5. The names of officers whom it is desired should be appointed will be forwarded by the G. O. C. in C. of each command to the war office without delay, and will be considered with others.

6. A report should reach the war office from the G. Os. C. in C. by the 14th February, 1917, stating whether there is justification for the continuance of these appointments.

Specimen statement of events from commission of offence to trial and promulgation.

Date.	R. C. M.	D. C. M.	G. C. M.	F. G. C. M. held behind "forward area." [1]
1st, Monday....	Offence committed. Accused confined.	As for R. C. M.....	As for R. C. M.....	As for R. C. M.
2nd, Tuesday..	Commander of guard sends guard report and charge to orderly room early in the morning. O. C. Coy. makes preliminary investigation before C. O.'s orderly room. C. O. investigates charge, and, unless he deals with case summarily, remands accused for C. M. Adjutant takes summary of evidence.	As for R. C. M.....	As for R. C. M.....	As for R. C. M.
3rd, Wednesday	C. O. signs charge sheet. Adjutant warns accused for trial at least 18 hours before court is to assemble. R. C. M. convened in bn. orders.	C. O. signs charge sheet and makes application for trial.	As for D. C. M.....	As for D. C. M.
4th, Thursday..	R. C. M. assembles. President sends proceedings to C. O.	Application received in brigade office.	Application received in brigade office. Forwarded to divisional commander.	As for D. C. M.
5th, Friday....	C. O. confirms proceedings.	D. C. M. convened in brigade orders for Monday, 8th.	Application received in divisional office. Forwarded to command H. Q.	F. G. C. M. convened in brigade orders for Sunday, 7th.
6th, Saturday..	Proceedings promulgated.	Accused warned for trial at least 24 hours before court assembles.	Application received at command H. Q.	As for D. C. M.
7th, Sunday....	.....	Dies non.....	Dies non.....	F. G. C. M. assembles. President sends proceedings to brigadier.
8th, Monday...	.....	D. C. M. assembles. President sends proceedings to confirming officer.	Application made to J. A. G. as to whether charge sheet and summary of evidence are in order and for warrant for J.A.	Proceedings received by brigadier, who confirms them (unless sentence is beyond his power),[2] and sends them to O. C. unit.
9th, Tuesday...	.....	Proceedings received by confirming officer, who confirms them and sends them to O. C. unit.	Application received by J. A. G. Returned with warrant to command H. Q.	Proceedings received by O. C. unit and promulgated.
10th, Wednesday.	.....	Proceedings received by O. C. unit and promulgated.	Charge sheet and summary of evidence and warrant received at command H. Q.	
11th, Thursday.	.....	.....	G. C. M. convened in command orders for Monday, 15th.	
12th, Friday...	.....	.....	Accused warned for trial at least 24 hours before court assembles.	
13th, Saturday.	.....	.....	Unusual day for G. C. M. to assemble.	
14th, Sunday ..	.....	.....	Dies non.	

[1] It is quite impossible to make a useful estimate for courts held in a "forward area," as military exigencies are so various.

[2] If the sentence be "death," the proceedings are sent through usual channels to C. in C., Expeditionary Force, unless any intermediate commander commutes to a less punishment. A sentence of penal servitude or imprisonment must, after confirmation, be submitted to the army commander for instructions as to whether the sentence is to be put into execution or suspended.

Specimen statement of events from commission of offense to trial and promulgation—Continued.

Date.	R. C. M.	D. C. M.	G. C. M.	F. G. C. M. held behind "forward area."
15th, Monday			G. C. M. assembles; J. A. sends proceedings to G. O. C. in C. command.	
16th, Tuesday			Proceedings received at command H.Q.; forwarded with G. O. C.'s remarks to J. A. G.	
17th, Wednesday.			Proceedings received by J. A. G.: returned to command H. Q. (unless sentence requires confirmation by H. M. the King).[1]	
18th, Thursday.			Proceedings received at command H Q.; confirmed by G. O. C. in C. and forwarded to divisional commander.	
19th, Friday			Proceedings received in divisional office; forwarded to brigadier.	
20th, Saturday			Proceedings received in brigade office; forwarded to O. C. unit.	
21st, Sunday			Dies non.	
22nd, Monday			Proceedings received by O. C. unit and promulgated.	

[1] If the sentence be one requiring confirmation by His Majesty the King, the judge advocate general sends the proceedings to secretary of state for war to submit to His Majesty. After confirmation the proceedings are sent from war office to command H. Q. and the procedure stated above is followed.

Lieut. Col. RIGBY. I would like to call attention to the third paragraph of that, in regard to the duties of the law officer.

(Lieut. Col. Rigby here read again paragraph 3 of the above letter.)

I should also like to put in the record this "Circular Memorandum on Courts-Martial for Use on Active Service," under date of August, 1918.

Senator WARREN. The whole of that is pertaining to the subject?

Lieut. Col. RIGBY. I think the whole of this might interest you. This was practically a court-martial manual for these field courts-martial.

(The circular referred to is here printed in full in the records as follows:)

CIRCULAR MEMORANDUM ON COURTS-MARTIAL FOR USE ON ACTIVE SERVICE.

[For official use only. This document is the property of H. B. M. Government.]

FORMS OF OATHS.

SWEARING COURT.

(*a*) "You ——— do swear that you will well and truly try the accused person (or persons) before the court according to the evidence, and that you will duly administer justice according to the army act now in force, without par-

tiality, favor or affection, and you do further swear that, except so far as may be permitted by instructions of the army council for the purpose of communicating the sentence to the accused, you will not divulge the sentence of the court until it is duly confirmed, and you do further swear that you will not, on any account, at any time whatsoever disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help you God."

WITNESSES' OATH.

(*b*) "The evidence which you shall give before this court shall be the truth, the whole truth and nothing but the truth. So help you God."

INTERPRETER'S OATH.

(*c*) "You do swear that you will, to the best of your ability, truly interpret and translate, as you shall be required to do, touching the matter before this court-martial. So help you God."

OATH FOR OFFICER UNDER INSTRUCTION.

(*d*) "You do swear that you will not divulge the sentence of this court-martial until it is duly confirmed; and that you will not, on any account, at any time whatsoever disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help you God."

JUDGE ADVOCATE'S OATH.

(*e*) "You do swear that you will not, unless it is necessary for the due discharge of your official duties, divulge the sentence of this court-martial until it is duly confirmed; and that you will not, on any account, at any time whatsoever disclose or discover the vote or opinion of any particular member of this court-martial, unless thereunto required in due course of law. So help you God."

CIRCULAR MEMORANDUM ON COURTS-MARTIAL.

This pamphlet, S. S. 412 (*b*), takes the place of S. S. 412 (*a*).

The distribution is much wider than was the case with S. S. 412, but it should be clearly understood that this fact in no way alters the incidence of responsibility for the correctness of court-martial procedure. Convening officers will continue to be solely responsible for the legality of charges, evidence, etc., and will insure that their staff officers are fully qualified to give them all the assistance required. The fact that a unit is in possession of the pamphlet in no way diminishes the necessity for strict supervision at every stage of a case.

Convening officers will see that a copy is laid before every court-martial.

Commanding officers of all units, to which copies are issued, will take steps to insure that all officers under their command make themselves acquainted with the contents.

If a copy is lost, the unit concerned will at once apply to the Publications Department, Army Printing and Stationery Services, Boulogne, for a copy in replacement.

S. S. 412 (*a*) is canceled.

The notes and instructions contained in this pamphlet are in no sense intended to be a substitute for the Manual of Military Law, but are meant to supply information on points which are not dealt with in it, or are found in practice to require further explanation. Officers dealing with courts-martial will continue to make constant reference to the manual in the course of their duties.

The contents have been drawn up with regard to the conditions of warfare which have existed in France for a long time past and still prevail. If and when these circumstances change materially it may be found difficult or even impossible to comply with many of these requirements, local commanders will then have to take the responsibility for any departure from what is laid down, bearing only in mind that these instructions represent the standard to be kept in view and that only such deviations are to be made as are dictated by the circumstances of the moment.

Under present conditions a large proportion of officers have little or no knowledge of military law, and every opportunity should be taken to instruct them in court-martial duties. Staff officers, whose duty it is to deal with courts-martial, should therefore endeavor to give lectures or less formal instructions on the subject as frequently as possible. The pamphlet affords ample material for the groundwork of such lectures, to which examples and comments should be added.

PART I.—PROCEDURE BEFORE TRIAL.

NOTE.—Rules of procedure 1–104 do not, in terms, apply to field general courts-martial. Many of the principles underlying these rules, however, have to be observed in conducting the proceedings of courts-martial of all kinds, and whenever, in the course of these notes, it is necessary to refer to any principle which is clearly stated in a rule, a reference is made to that rule; not because of a legal obligation to follow the rule itself, but for convenience of reference.

New matter inserted in this edition is marked by a marginal line.

CH. I.—PRELIMINARY PROCEDURE.

1. *Expedition.*—Every effort should be made to expedite court-martial cases at every stage. The main object of a F. G. C. M. is to bring an offender to justice with the least possible delay, and for this reason the rules of procedure are specially framed to make the procedure of a more expeditious character than that of an ordinary court-martial. (*See* G. R. O. 3232.)

2. *Arrest.*—(*a*) An accused when under close arrest can only be called upon to perform such duties or obey such orders as are necessary for his personal cleanliness and well-being.

(*b*) When men are in the trenches, arrest is neither appropriate nor necessary, except in cases where a man is behaving in such a way that he would be dangerous unless an armed sentry were placed over him. If, therefore, when a battalion goes into the trenches, or a battery into action, it is thought desirable, having due regard to the circumstances of each case, to release soldiers from arrest for the performance of their duty, this may be done, without prejudice to rearrest when the period of duty terminates.

(*c*) In serious cases, if information is received that the witnesses will not be available for some time, the accused can be released from arrest, without prejudice to rearrest when it becomes possible to proceed with the case. Unless, however, it is imperative to try by court martial, the case should be disposed of summarily.

3. *Application for F. G. C. M.*—The following documents should be forwarded by the unit to the convening officer (usually an infantry brigade commander or an officer holding an equivalent command):

(*a*) Summary or statements of evidence.

(*b*) Proposed charges, whether in form of charge-sheet or otherwise.

(*c*) Certified true copy of conduct sheet.

The use of unnecessary documents when applying for a F. G. C. M. should be avoided; e. g., duplicates of above, Army Form B. 116 (Form of Application for a Court-Martial), Army Form B. 296 ("Statement of character and particulars of service of accused"), lists of witnesses or routine medical certificates.

4. *Summary or statements of evidence.*—(*a*) For a F. G. C. M. a summary should be taken, if practicable, and in all cases, whether a summary is taken or not, sufficient statements in writing are required to show the convening officer and the accused the nature of the evidence which will be given by each witness. As a general rule it is not necessary to bring a witness from a long distance for the purpose of a summary, provided that a statement of his evidence (signed if possible) is obtained. For instance, it is never necessary to bring a military policeman from a distant town merely to prove the arrest of the accused. In such a case either the statement on the back of the crime sheet (A. F. B. 252) should be attached, or a statement such as the following:

No. ———. Sgt. ——— M. M. P., will prove the arrest of the accused at ——— at —— p. m. on ———.

(*b*) The accused will be present if a summary is taken, and all statements of witnesses not taken in his presence will be shown to him. The nature of

the charge or charges on which it is proposed to try him should be explained to him by an officer when the summary is taken or the statements are shown, and as soon as the convening officer has signed the convening order a copy of the charges should be given to the accused.

(*c*) The utmost care should be taken to insure that the accused fully understands the nature of the offense and of the evidence, and that all reasonable requests in connection with his defense are granted.

5. *Defense of accused.*—(*a*) When a court-martial is to be held for the trial of an offense of so serious a character that a death sentence is likely to be awarded, the convening officer, whenever practicable, will arrange for the attendance at the trial of an officer to act as friend of the accused. Care will be taken to select from the officers available one who is a barrister or solicitor or, if in special circumstances this is not possible, one who by reason of ability and discretion will be able to present the case of the accused adequately to the court.

(*b*) This must not be taken in any way to derogate from the right of the accused to be assisted or represented by such friend or counsel as he may himself select.

(*c*) The friend of the accused should be notified and a copy of the evidence given to him in sufficient time to enable him to give due consideration to the case and to consult with the accused.

(*d*) The attendance of a friend of the accused in no way relieves the court of the responsibility for safeguarding the interests of the accused and eliciting all facts which may tell in his favor.

(*e*) If assistance has been offered to the accused and has been declined, that fact will be stated in the proceedings.

6. *Attendance of witnesses.*—(*a*) As early as possible he should be asked for the names of any witnesses he may wish to call, and steps should be taken to secure their attendance.

(*b*) Before application is made for the attendance of a witness from a distance, care should be taken to ascertain that his evidence really is material, and in forwarding an application to superior authority, the facts should be stated which the witness is expected to prove.

(*c*) It should be remembered that written evidence as to character can always be accepted for the defense, and this will often obviate the necessity for the attendance of a witness.

7. *Notes on taking summaries.*—(*a*) Witnesses are not sworn unless the accused specially demands it.

(*b*) The warning given to the accused before he makes a statement is to the effect that he is not bound to make a statement, and that if he does make one it may be used in evidence against him.

(*c*) A summary will contain all material facts, stated shortly and to the point. All hearsay and other inadmissible evidence must be excluded.

(*d*) On a charge of drunkenness a witness will definitely say that a man is "drunk" or "sober," and will be prepared to give reasons for his opinion, if necessary. In law there is no intermediate state.

8. *Form of summary.*—The following is an example of a summary of evidence, and may be useful as a guide: Summary of evidence in the case of No. ———, Private ———, 1st Battalion ———.

1st Witness: No. ———, Corporal ———, 1st Battalion.

At ——— on the 25th June, 1918, the accused, who is a member of my section, was absent from 6 a. m. parade. I called the roll.

Cross-examined: I do not know whether you reported sick that morning.

———, *Corporal,*
1st Battalion ———.

2d Witness: No. ———, Sgt. ———, 1st Battalion, ———, states:

At ——— at 8.30 p. m. on the 25th June, 1918, I saw the accused near the battalion lines. He was drunk. I placed him under arrest.

———, *Sergeant,*
1st Battalion ———.

3d Witness: No. ———, Cpl. ———, 1st Battalion:

At ——— at about 8.30 p. m. on the 25th June, 1918, I was with Sergt. ——— when he arrested the accused near the battalion line. Accused was drunk.

———, *Corporal,*
1st Battalion ———.

The accused, being duly warned, states:
I was not drunk when Sgt. ——— arrested me. I was sick, and asked to be paraded before a medical officer.

———, *Private,*
1st Battalion ———.

or

Accused declines to make statement.
Taken down by me at ——— this 27th day of June, 1918, in the presence of the accused.
Rules of procedure 4 (*c*, *d*, and *e*), complied with.

——— *Lieut.,*
1st Battalion.

9. *Charges.*—Rule of procedure 108 provides that in the case of a F. G. C. M.—"The statement of an offense may be made briefly in any language sufficient to describe or disclose an offense under the army act." All that is generally necessary is a form of charge (without particulars or with brief particulars) as in the Manual of Military Law, pages 650–659. It is advisable to use the exact words of the army act.

For further notes on charges, see below.

10. *Certified true copy of conduct sheet.*—A copy of the original sheet should be made, and the words "certified true copy" written across it, signed and dated by an officer. The prosecutor will produce this on oath at the trial.

11. *Attendance of witnesses at the trial.*—(*a*) Although the evidence of witnesses at the taking of the summary may be dispensed with, at the trial the presence of every witness is essential. Documentary evidence such as written statements of evidence can not be admitted at a court-martial. The practice of not summoning witnesses for the trial because the accused states his intention of pleading guilty is wholly incorrect. For instance, in a case of desertion the attendance of the military police, or the person who first made the arrest, will be secured.

(For evidence of surrender see army act, S. 163 (j) and (k), and K. R., para. 517*a*.)

(*b*) Certificates of surrender must be signed personally. They can not be signed by one officer "for" another.

CH. II.—CONVENING F. G. C. M.

12. *Composition of court.*—(*a*) Though, according to the rules of procedure, any commanding officer may convene these courts, a field general court-martial ought not to be considered the equivalent of a regimental court-martial as regards the composition of the court (see R. P. 20, note 1), and, whenever practicable, such courts should be convened by infantry brigade commanders or officers holding equivalent commands.

(*b*) Specially qualified officers are stationed at convenient centers (usually corps headquarters or bases) whose whole time is devoted to sitting as members of courts-martial. No case of a difficult, complicated, or serious nature should ever be tried without the attendance of one of such officers.

(*c*) A court-martial officer will take no part in preparing for trial any case in which he may have to act as a member of the court.

(*d*) He will invariably make the record of evidence and will advise the court on all points of law and procedure. His opinion will have the same weight as that of a judge advocate (see R. P. 103 F).

(*e*) The convening order on Army Form A 3 must be signed personally by the convening officer. An officer can not sign it "for" another officer. All alterations will be initialed by the convening officer.

(*f*) The members of the court must be named.

12 (a). The convening officer will insure that a competent prosecutor is appointed (for duties, see R. P. 60).

CH. III.—CHARGES.

13. *Responsibility of staff captains.*—Staff captains of brigades and officers holding similar appointments should remember that they are responsible to convening officers that the proper charges are preferred, that there is evidence to support them in every detail, and that all inadmissible evidence is erased. They are not relieved of any responsibility by the fact that this pamphlet is issued to battalions, etc.

14. *Complicated cases.*—All complicated cases, all cases of fraud, or cases where there is doubt whether the weight of evidence is sufficient to secure a conviction, should be submitted, for legal advice, to Army headquarters, or to the D. J. A. G., as the case may be, prior to the convening of the court.

15. *Multiplication of charges.*—Multiplication of charges should be avoided, and convening officers should bear in mind that when a soldier is to be arraigned on a serious charge, any minor offenses against him may be dropped.

16. *Number of cases on A. F. A. 3.*—In serious cases, *e. g., desertion, cowardice,* one case only should be entered on each A. F. A. 3. At the same time, if two or more prisoners are concerned in the same transaction, it is eminently desirable that the proceedings should be forwarded at the same time.

17. *Election to be tried.*—When a man elects to be tried by F. G. C. M., the words "Elects trial," should be written prominently on A. F. A. 3 and on the charge sheet, if any. (See K. R., para. 487A and 583 (1).)

18. *Entering the charge.*—(*a*) Though the charge can be framed in any language sufficient to describe an offense under the Army act, it should follow the words of the act as far as possible. For instance, "using obscene language to a N. C. O." is incorrect. It should be "using insubordinate language to a superior officer."

The following are also incorrect, because they do not sufficiently show the offense intended: "Willfully becoming a straggler," "not joining regiment when ordered to do so," "refusing to obey."

(*b*) A charge sheet is not essential, and in most cases it should be possible to enter in the second column of the schedule, on page 2 of A. F. A. 3, all that is necessary. Otherwise, a separate sheet can be used which will be initialled by the convening officer.

(*c*) In all charges of a general nature, *e. g.*, an offense under S. 40 A. A., or an offense against an inhabitant, sufficient particulars must be given, and if it is found impracticable to enter these in the schedule, they may be entered on a separate piece of paper, or a charge sheet may be attached. The object in view is to let the accused know, from the charge set out, exactly what the offense is which the prosecution intends to prove, *e. g.*:

"Offense against person of inhabitant, indecent assault on * * *," or "neglect to the prejudice, self-inflicted wound."

(*d*) More than one offense will never be included in one charge (R. P. 11*a*): If the evidence discloses more than one offense, sufficient particulars will be given to show which offense is included in each charge laid, *e. g.*, if an accused is alleged to have stolen the goods of several comrades, the particular goods and the comrade referred to in each charge will be stated.

(*e*) Such matters as "when a defaulter," "when undergoing F. P. No. 1" will not be inserted in a charge.

(*f*) Alternative charges should be marked "alternative" in the schedule.

19. *Cowardice, A. A., S. 4 (7).*—Charges of cowardice, in the absence of specific evidence of an exceptional character, can only be sustained when the occurrence takes place under fire or in immediate proximity to the enemy. The fact of absence is not, by itself, sufficient to support a charge of cowardice.

20. *Offenses by sentries, A. A., S. 6 (1) (k).*—In such cases it must always be proved what the post was, that the accused was posted, and that he was still on duty when the offense was committed.

If the accused received permission to leave his post for a short time but did not return, he can not be charged with leaving his post.

If he is found asleep away from his post, he should not be charged with sleeping on his post, but with leaving it.

(See notes 3 and 13 to A. A., S. 6., M. M. L., page 382.)

The words "sentinel" or "sentry" do not apply to telephone operators or to men on traffic control duties. For stablemen, see K. R., para. 560.

If there is any doubt as to an offense falling under S. 6, it should be charged under S. 40.

21. *Drunkenness.*—(*a*) If a person subject to military law takes a drug, and the effect of that drug, either by itself or in conjunction with alcohol, is to render him unfit for duty, that person may be lawfully convicted of the offense of drunkenness, from whatever motive he may have taken the drug, unless he takes it, upon the order of a medical officer, having previously reported sick in the proper manner.

In the case of a medical officer, the opinion of another medical officer will be necessary before taking a drug that may render him unfit for duty.

(*b*) In framing charges of drunkenness together with other charges, *e. g.*, threatening or insubordinate language, particular attention is drawn to M. M. L., page 22, para. 30 and Note (*c*).

22. *Violence, A. A., S. 8 (i) and (2).*—Charges should only be framed under subsection (*i*) in cases where the violence has been committed under exceptionally grave circumstances.

23. *Disobedience, A. A., S. 9 (i) and (2).*—(*a*) A charge under A. A., S. 9 (*i*), should only be preferred in cases of so grave a nature that the court are likely to award the sentence of death. "Willful" defiance must be proved specifically, and it is always advisable to submit the case for legal advice beforehand.

(*b*) In all other cases the charge will be laid under A. A., (9) (2).

(*c*) A command means an order given to a man as an individual.

(*d*) A charge under this section will not lie unless the accused was given sufficient opportunity to comply, and the fact that he did not comply must be proved.

(*e*) The expression "refused to obey" will not support a charge under this section. This or other irregular conduct in connection with an order may come under S. 8 or S. 40.

(*f*) When in close arrest a soldier may not be ordered to perform any duties except such as are necessary to his own cleanliness and health, or as stated in K. R., paragraph 482 (*q. v.*).

In open arrest he may also be ordered to attend parades.

(*g*) Paragraph 9, M. M. L., page 17, should be carefully studied.

24. *Desertion* (M. M. L., p. 18, pars. 23 and 16).—The distinction between desertion and absence without leave consists in intention.

A soldier is guilty of the crime of absence without leave when he is voluntarily absent, without authority, from the place where he knows, or ought to know, that it is his duty to be.

If, when he so absented himself, the soldier intended either (*a*) to leave His Majesty's service altogether, or (*b*) to avoid some particular important duty for which he would be required, he is guilty of desertion.

In other words, desertion is absence without leave caused by either of the intentions mentioned in the last paragraph, and the court, before convicting a man of desertion, must be satisfied beyond reasonable doubt that he had one or other of those intentions.

The existence of an intention, like any other fact, must be proved by evidence, but its existence is proved when facts are established from which the intention may reasonably be inferred. E. g., it is a rule of law that every man is presumed to intend the natural and probable consequences of his acts; therefore if it is proved that the accused knew that his battalion had been ordered to attack next morning and that he absented himself without leave and remained absent until the attack was over, the court would be justified in finding that he intended to avoid taking part in the attack, unless he can account satisfactorily for his absence.

A. *Intention to desert His Majesty's service altogether.*—The existence of this intention is to be inferred from the circumstances of the absence, e. g., length of absence (though this by itself is inconclusive), distance from his unit and nature of the place at which accused is arrested, whether when arrested he was wearing uniform or plain clothes, and if the former whether he was in possession of arms or equipment or of pay book or other marks of identity, whether he was arrested in hiding or surrendered himself into military custody, and so on.

B. *Intention to avoid a particular important duty* (sometimes called "constructive" or "short" desertion).—In order to establish this intention, evidence must be produced to prove:

1. That the man knew with reasonable certainty that he would be required for this special duty;

2. That he was absent and thereby avoided the duty.

To prove 1, the prosecution should show:

(i) That the man was warned, or failing this—

(ii) That the company, etc., as a whole was warned, if possible on parade at which the roll was called, and that the accused was present, or

(iii) That, having regard to the usual custom of reliefs, he must have known that the turn of his company, etc., was imminent.

(An officer or senior N. C. O. should give evidence as to the usual custom of reliefs; and definite evidence as to the dates of the special duty which the accused missed should be given by these witnesses), or

(iv) That the period of absence was so long that he must have known for a certainty that he would miss active operations by such lengthy absence.

The burden of proof is then shifted, and the man will have to convince the court that he did not know that he would miss the duty in question.

Desertion involves a question of special intention, and there can be no intention without knowledge; where, therefore, the accused has been absent for a short time only, the prosecutor must prove that the offender knew, with reasonable certainty, that he would be required for some special duty. If the only evidence is that the man absented himself, and no evidence is produced (e. g., special warning, usual routine, length of absence), to show the probable state of his mind, the court can not make any assumption as to his intention, and they can convict the accused of absence only.

It should be noticed that it is necessary to produce evidence of facts such as those specified above, which will prove the accused's knowledge. Such statement as "The accused knew," "It was common knowledge," "The whole company knew," are not evidence.

Where desertion or absence is charged it is advisable, and often necessary to show, with approximate certainty, the time and the circumstances of the commencement and termination of the period of absence.

As regards the commencement of the period of absence the best evidence is usually that of a noncommissioned officer who called the roll and found the accused absent, and such evidence should always be produced; if this is impossible owing to casualties or other causes, evidence can often be given by some noncommissioned officer or man that on or about a certain date or time the accused was present with, and that at a later period he was absent from his section or platoon.

It is as a rule impossible to sustain a charge of desertion without proof as to the manner in which the period of absence terminated. It is of no use to call a noncommissioned officer to say that at such a date the accused was brought back under escort.

But unexplained absence for however short a time is sufficient in law to sustain a conviction for absence, as distinguished from desertion.

Doubtful cases to which the above rules are difficult to apply should be submitted for legal advice before trial. If after trial a doubt arises, the confirming officer should obtain advice before confirming, with a view, if necessary, to ordering a revision, the court being directed to convict of absence only.

Where there is a charge of desertion an alternative charge of absence will not be added.

In cases where a soldier surrenders himself as an absentee or deserter, a certificate under army act, section 163 (j) or (k) should be obtained to obviate the attendance of a witness. The certificate must comply strictly with the requirements of the act. This procedure does not apply where the man has been arrested.

If the accused has been taken into custody in the zone of operations, evidence, which must be given personally at the trial, can be obtained through the agency of the provost marshal, whose staff have full information as to the apprehension of stragglers (see pars. 6 and 11). If the accused was arrested in England the original A. F. O., 1618, Part I, will be obtained and produced by a witness on oath.

When the accused has been arrested by or has surrendered to the civil police in England and A. F. O. 1618 is to be produced as evidence, the "particulars in the evidence" on this form should be pasted over so as not to be seen by the court if likely to prejudice the accused, e. g., if they contain a statement that he was arrested for a civil offense; but evidence in relation to the charges of desertion or absence on which the soldier is being tried which would be admitted as parole evidence before the court should not be pasted over.

25. *Looting.*—(*a*) Any man who is absent from his unit and found to be in possession of what is obviously plunder, or found in a furnished house which is unoccupied and in which he has no right to be, should be charged with "Leaving his commanding officer to go in search of plunder."

In this case it may be advisable to add an alternative charge for absence.

(*b*) If it can not be proved that the man was absent from his unit when arrested, but he is found in an unoccupied furnished house where a door or window has been forced by him, he should be charged with "Breaking into a house in search of plunder."

(*c*) If it can not be proved that the man was absent from his unit when found to be in possession of what is obviously plunder, or if he is found in a furnished house which is unoccupied and there is no evidence of "breaking," he should be charged under S. 40.

26. *Offenses against the censorship regulations.*—If a genuine letter is submitted for censorship in the ordinary course, it will not be made the subject of disciplinary action. If, however, there is evidence that an objectionable letter is submitted, not bona fide as a letter for transmission, but expressly for the purpose of insulting any officer who may read it, a charge under S. 40 can be preferred.

A letter containing a cipher is not a letter submitted bona fide, and a charge under S. 40 can be laid.

27. *Murder.*—When a charge of murder is preferred an alternative charge of manslaughter should always be added, if the facts are such that the court may wish to convict of the lesser offense. Charges of murder should be submitted to the D. J. A. G. before trial.

28. *Self-inflicted wounds.*—(*a*) The object in view is to prevent any man who has inflicted a wound upon himself, either intentionally or negligently, from being withdrawn further from the firing line or for a longer period than is absolutely necessary.

(*b*) Special provision for dealing with these cases is made in each army, and the circulars issued on the subject should be studied.

(*c*) Trial is held at the earliest possible moment, and if convicted, the man when fit for duty returns to his unit. In every case where he is likely to be fit for duty again in a few weeks the sentence should be commuted to field punishment. Medical officers when giving their evidence should be asked as to the probable duration of incapacity.

(*d*) It is usually impossible to obtain a conviction under S. 18 for "maiming," as the special intention has to be proved. Consequently, unless the evidence is conclusive, such cases should be tried under S. 40, "Neglect to the prejudice," etc.

29. *Section 15.*—(*a*) Where the charge is for absence by reason of overstaying leave, the period of absence charged will be that between the date when the accused might reasonably have rejoined his unit and the date on which he did, in fact, rejoin, or on which he was arrested.

(*b*) A charge of "Failing to appear at the place of parade," etc., should never be preferred on active service, nor should any charge under S. 15 (3) or (4). A charge of absence should be laid instead.

CH. IV. MISCELLANEOUS.

30. *Acting and lance rank.*—In consequence of difficulties which have arisen in dealing by court-martial with offenses committed by privates and N. C. O.'s holding acting rank, the following instructions have been published:

> Whenever a private or N. C. O. holding acting rank is brought to trial before a court-martial, the permanent rank of the accused should invariably be shown, e. g., "private (acting corporal)" or "corporal (acting sergeant major)."

In this manner the permanent rank of the accused will be brought to the notice of the court. Sentences are frequently rendered inoperative through N. C. O.'s being wrongly described. (See M. M. L., p. 550, note 4.)

31. *Insanity*—The procedure in the case of insanity is set forth in army act, S. 130.

Where there is ground for supposing that the accused was insane when he committed the crime, or is insane at the time of trial, a medical board should be held.

(1) If the board is of opinion that the accused was insane when the offense was committed but is now fit for trial, a court-martial will be held and evidence will be taken to enable the court to bring in a finding as indicated in R. P., 57 (A).

(2) If the board is of opinion that the accused is now insane, then, if the offense is trivial, the accused should be evacuated without trial; but if it is a

serious offense, a trial will be held and evidence taken to enable the court to bring in a finding as indicated in R. P., 57 (A).

In both the above cases, the evidence will be given before the finding.

NOTE.—The proceedings of the board are not admissible in evidence unle s the accused wishes to use them in his defense. Evidence will usually be given by one or more members of the board.

32. *Mental deficiency, shock, etc.*—Where a medical board has been held and the accused found sane, or when the question of insanity has not arisen at all, the prosecution or the defense may call evidence to show that the accused is lacking in intelligence, or is suffering from mental shock, etc.

This class of evidence should usually be given after the finding, unless the accused calls it in his defense to prove that he was not responsible for his actions at the time of the occurrence, when it may be given before the finding.

It is similar to statements made by the accused in mitigation of punishment, and will be considered by courts in estimating the sentence.

(NOTE.—In no case can further evidence be heard by the court by way of revision or otherwise after they have completed the proceedings and have forwarded them to the confirming officer.)

PART II.—THE TRIAL.

CHAPTER V. BEFORE STARTING THE TRIAL.

33. *Charge.* (See R. P. 108, M. M. L., p. 632.)—(*i*) Read carefully the charge and particulars (if any), and compare them with the corresponding section of the army act, to see whether any offense is disclosed.

If no offense seems to be disclosed, consult the convening officer. A charge will not be altered in any way by the court without his authority.

(*ii*) Read the whole of the section of the army act under which the offense is charged, including any proviso, and also the notes in the M. M. L. on that section.

(*iii*) Split up the offense into its component parts, with a view to making sure that each part of it is established by the evidence, e. g., in a charge under the following section the following facts would have to be proved:

Section 6 (i), (k):

1. That accused had been posted as a sentry.
2. What his post was.
3. That accused was found asleep.
4. That he was then on his post.
5. That he was then still on duty.

CHAPTER VI. PROCEDURE AT TRIAL.

34. *Preliminary.* (Have the M. M. L. open at R. P. 105 et seq., and see that the R. P. are complied with.)

(*a*) See that the court is properly constituted according to R. P. 106 and 107 M. M. L., pages 631 and 632.

(*b*) Have all the accused, prosecutors, witnesses, etc., in, and read page 1 of the A. F. A. 3 (convening order).

(*c*) Give each accused his right of challenge (see R. P. 110). If any accused challenges, and the challenge is upheld, report the matter immediately to the convening officer, and, if necessary, adjourn the trial of that accused.

(*d*) Swear the court. A. A., S. 52 and R. P. 109 and 111. Forms of oaths are printed inside the cover of this book. (For affirmations, etc., see M. M. L., A. A., S. 52 (4) and note, p. 432; R. P. 28, p. 588; R. P. 30, p. 589.)

(*e*) March out the witnesses and all accused except the accused person (or persons) to be tried first and their counsel or friends (see R. P. 109).

An accused charged jointly with another accused has the right to demand to be tried separately, and if several accused are charged separately they can not be tried together unless they consent. Such consent should be entered on the proceedings.

(*f*) Arraign the accused (see R. P. 112), and enter plea of accused on each charge in column 3 of page 2 of A. F. A. 3.

35. *On plea of guilty.*—(*a*) If the accused pleads guilty, see that the provisions of R. P. 35 (B), M. M. L., p. 591, and R. P. 37, p. 593, are complied with before entering the plea.

(*b*) A plea of "guilty" should not be accepted in any case in which a death sentence is likely to be awarded.

(*c*) Where charges are alternative, a plea of "guilty" can not be taken on more than one charge.

(*d*) As a rule, unless the accused pleads "guilty" to the more serious of alternative charges, pleas of "not guilty" will be entered on both charges, and the trial proceeded with. After hearing the evidence the court can determine on which charge the accused is "guilty." Findings of "guilty" and of "not guilty" should then be entered in column 4 of page 2 of A. F. A. 3 accordingly.

(*e*) A plea of "guilty" covers all defects in the evidence unless it appears from the summary, if any, or otherwise, that the accused has not in fact committed the offense charged, in which case a plea of "not guilty" should be entered.

36. *Statement in mitigation of punishment.*—(*a*) In addition, the court should record any statement in mitigation made by the accused. Such statements may be on oath. If the accused makes no such statement on a plea of guilty, that fact should be recorded. (R. P. 37 (F), p. 593, and note 4 on p. 594.)

(*b*) Whenever the accused makes any statement in mitigation of punishment, or otherwise, which implies that he did not commit the offense, a plea of not guilty will be entered and the accused tried on that plea.

(*c*) For the purpose of deciding whether or not to accept a plea of guilty, the accused's statement will be assumed to be true. The test is not whether it is believed or is likely to be believed; but whether, if true, it would afford a defense to the charge or would suffice to reduce the finding to one of a less grave offense.

(*d*) E. g., if an accused charged with striking a superior officer says that he did not know that he was a N. C. O., a plea of not guilty will be entered. A similar course will be followed, if an accused pleads guilty to drunkenness, and says, "I admit having had drink, but I was fit for duty," or to a charge of desertion, and says, "I admit I was absent, but I had no intention of missing duty."

(*e*) It is usually advisable to enter a plea of "not guilty" whenever the accused says anything about his intentions or alleges ignorance that he was doing wrong.

(*f*) The summary, or statement of evidence, if available, will be attached to the proceedings.

(*g*) If there is none, sufficient evidence on oath will be taken down to enable the confirming officer to judge of the gravity of the offense.

(*h*) Evidence of character. The procedure is exactly the same as on conviction after a plea of "not guilty."

(*i*) Complete A. F. A. 3.

37. *On plea of not guilty.*—The case proceeds as laid down in R. P. 114, M. M. L., page 633.

38. *Record of evidence.*—(*a*) The summary will not be used as a record of the evidence given at the trial, nor is it sufficient to say, "The witness corroborated his evidence on the summary" or "corroborated the last witness." A short note of what the witness actually says at the trial will be taken in narrative form.

(*b*) Where a number of accused persons are tried together for an offense charged to have been committed by them collectively, one record covering all the accused can be taken. Where men are being tried separately, the record of evidence against each of them must be complete in itself, and such a statement as "For further evidence see trial of * * *" is improper, as this does not comply with the requirements of R. P. 114 (*c*).

(*c*) Evidence (including cross-examination) need not be taken down as question and answer unless the prosecution or defense specially demand it. It is within the discretion of the court to make the record in such manner as will then make the facts clear.

(*d*) Ordinary witnesses should be called in the order of the events to which they testify, and not in order of rank or seniority.

(*e*) Proper names should be recorded in block letters.

39. *Form of record.*—Statements such as "R. P. 83B complied with," "Witness withdraws," "The prosecution is closed," etc., are not necessary.

The following is sufficient:

Trial of (number, rank, name, unit).

(The name, etc., of the prosecutor, and if a friend of the accused represents him or assists him at the trial, his name, etc., will be entered. If either person is a qualified barrister or solicitor, the fact will be stated.)

40. *Prosecution.*—First witness (number, rank, name, unit), sworn, states ———.

(The witness should describe himself, e. g., "I am C. S. M., of B Company, to which accused belongs," and his evidence should then continue with time, date, and place, e. g., "At 4.30 p. m., on the Jan. 12, 1916, in the fire trenches * * *," or "about 2 or 3 p. m., on a Thursday (I forget the date) in billets, * * *.")

Cross-examined ———.

(A witness may be cross-examined about any matter which has a bearing on the case. The notion that cross-examination is limited to questions directly arising out of a witness's evidence in chief is erroneous. For instance, a witness can, and should, be cross-examined as to any facts tending to assist the intended defense, though he has not referred to them; or a witness as to facts for the prosecution can be cross-examined to establish the good character of the accused.)

Reexamined and not cross-examined.

Examined by the court ———.

(A witness also, at any time before the court is closed for consideration of the finding, may be "examined by the court" to clear up any point either for the prosecution or for the defense. He may be recalled, if necessary, for the purpose. R. P. 86, M. M. L., p. 622.)

Second witness. (As before.)

41. *Defense.*—It is the duty of the president to inform the accused at the close of the case for the prosecution that he can either—

(*a*) Give evidence as a witness on oath, in which case he is liable to be cross-examined by the prosecution and examined by the court; or

(*b*) Make or hand in a statement, not on oath, in which case he is not liable to be questionad in any way; or

(*c*) Say nothing.

(*d*) He can also, if he wishes to do so, hand in a written statement, on oath, in which case the statement becomes his evidence, and he can be cross-examined on it.

The president should also inform the accused that the court will attach more weight to evidence on oath than to a statement not on oath.

The president should then ask the accused which course he wishes to adopt and whether he has any witnesses to call in his defense.

Accused (Number, rank, name, unit), sworn, states ——— or hands in written statement marked ———. Cross-examined ——— (*see* R. P. 80 (3)), examined by court ——— (*see* R. P. 80 (3)), or accused (No., rank, unit), not sworn, states ———, or accused (No., rank, name, unit), not sworn, hands in, written statement marked ———, or accused (No., rank, name, unit) makes no statement.

In each of the three latter cases he can not be cross-examined by the prosecution or by the court, and throughout the proceedings, except when the accused is giving evidence on oath, the court should be very careful not to ask him questions about the facts of the case such as to draw from him statements to his disadvantage.

Second witness: (Number, rank, name, regiment, etc.) ——— (as in evidence for prosecution), or accused calls no witnesses.

42. *Evidence as to character before finding.*—The accused, if he wishes to do so, may call evidence of good character before the finding. He should also be permitted to produce testimonials, etc., to which the court should give such weight as they may think fit. Before accused decides to give or call evidence of good character it should be pointed out to him that this will entitle the prosecutor to cross-examine and to produce evidence of bad character. For this purpose the prosecutor may produce the field-conduct sheet with entries of previous offenses.

In no other circumstances can evidence of bad character be produced before finding.

43. *Plea of illness, etc.*—When a soldier, in his defense or in mitigation of punishment, urges a substantial plea, resting on medical grounds, a medical witness should invariably be called either to substantiate or to rebut this before the finding if it is in defense and after if it is urged in mitigation of punishment.

44. *Finding.*—(*a*) In the case of an equality of votes the finding is entered as one of "Not guilty." (S. 53 (8) A. A., M. M. L., p. 433.)

(*b*) The finding on each charge is entered in column 4 of page 2 of A. F. A. 3 simply as 'Guilty" or "Not guilty."

(*c*) If the accused pleads "Guilty," a finding of "Guilty" is entered as well as the plea of "Guilty."

(*d*) If the court is in doubt on which of alternative charges to find accused guilty, he should be found guilty of the simpler offense or a special finding should be brought in, as to which *see* R. P. 44 and note, M. M. L., page 598.

(*e*) The only cases in which an accused can be found guilty of a lesser offense or of the same offense with variations in detail are given in S. 56 A. A.

(*f*) A special finding can not be recorded on a plea of "guilty."

(*g*) Except on a charge of attempting to desert, in no case can an accused be found guilty of a graver offense than that charged, nor can he be found guilty of an entirely different offense, even if there is evidence of such an offense.

45. *Honorable acquittal.*—A finding of honorable acquittal is incorrect in a case where the charge does not affect the honor of the accused. It is equally inappropriate unless the accused's conduct has been irreproachable throughout the transactions investigated by the court.

46. *After finding.*—If an accused is found not guilty, he will be so informed and will be released from arrest.

47. *Evidence of character after finding.*—(*a*) After a finding of guilty (whether after a plea of guilty or not guilty) the court will take and record such evidence of character and particulars of service of the accused as is available.

(*b*) As a general rule no evidence of bad character should be produced before the court, except the field conduct sheet, A. F. B. 122, which will be produced by a witness on oath after the finding, to guide the court as to sentence.

(*c*) The field-conduct sheet will not be attached in original, but either extracts recorded or a certified true copy attached.

(*d*) If evidence of character is not available at the trial, a not to this effect will be recorded.

(*e*) Any evidence of good character is admissible and will be recorded.

(*f*) If the accused is under a suspended sentence or a sentence of field punishment, the court will be informed of this after the finding, and the fact will be recorded.

(*g*) When recording evidence of character it should always be stated whether it is taken "before finding" or "after finding."

(*h*) Finally the accused will be asked if he wishes to say anything further, either as to character, in mitigation of punishment, or otherwise, and a record will be made of his statement, or of the fact that he declines to make one.

48. *Sentence.*—(*a*) Only one sentence is awarded whether the accused has been found guilty on one or more charges. This sentence may, however, where authorized by the army act, consist of more than one punishment, e. g., reduction to the ranks and £1 stoppages, or 28 days' F. P. No. 1 and three months' forfeiture of pay.

(*b*) Sentence is entered in column 4 of page 2 of A. F. A. 3, below the findings. It should be entered briefly, e. g., "60 days' F. P. No. 1," "2 years' I. H. L.," "3 years' P. S.," "Death," etc.

(*c*) The maximum punishment which can be awarded will be found laid down in the section under which the charge is laid.

(*d*) "Such less punishment" can be found by reference to section 44, A. A., M. M. L., page 416.

(*e*) To award death or P. S. a court must consist of three or more officers. S. 49 (i) (d), A. A., M. M. L., page 429.

(*f*) To award death the opinion of the court must be unanimous, and an entry to this effect will be made in the schedule. S. 49 (2), A. A., M. M. L., page 429.

(*g*) Other sentences are decided by a majority, the president, if necessary, having a casting vote. S. 53 (8), A. A., M. M. L., page 433; also R. P., 69, and notes, M. M. L., page 615.

(For sentence where an accused has elected trial, see Ch. V., par. 80, M. M. L., p. 50.)

49. *Recommendation to mercy.*—As to recommendation to mercy, see M. M. L., Ch. V., par. 88, page 51.

Care will be taken to see that a recommendation to mercy is consistent with the finding. For instance, on any charge a recommendation to mercy "on

the ground that the accused appears not to be responsible for his actions" would invalidate the conviction, as would also a recommendation "on the ground that the accused may not have known that he had no right to the goods" on a charge of theft.

50. *Notes on sentences.*—The following points should be especially noted:

(*a*) Imprisonment with or without hard labor can not be awarded for a term longer than two years, including any sentence which may be running at the time.

(*b*) Penal servitude can not be awarded for a term less than three years. Maximum is for life.

(*c*) Field punishment can not be awarded for a term longer than three (calendar) months, taking into account any sentence which the accused may already be undergoing. It should be awarded in days.

(*d*) Except on the lines of communication it is a rule for any punishment up to three months to be in terms of field punishment, and not imprisonment with hard labor.

(*e*) Detention and discharge with ignominy are not awarded on active service in the field.

(*f*) Forfeiture of pay not exceeding three months may be awarded on active service in addition to or without other punishment. S. 44 (6), A. A., M. M. L., p. 417.

As this forfeiture of pay commences on the day of award, if field punishment is also awarded (for which pay is ipso facto forfeited, A. A., S. 138 (i)) the two forfeitures of pay will run concurrently; consequently, a sentence of forfeiture of pay, to be effective, must be awarded for a longer period than any field punishment awarded. (See footnote to K. R., par. 494, as amended by Army Order 209, 1912.)

(*g*) A fine not exceeding £1 may be awarded in cases of drunkenness only, either in addition to or in substitution for any other punishment. S. 19, A. A., M. M. L., p. 398.

(*h*) *Stoppages.*—To enable a court-martial to sentence a soldier to stoppages of pay, the amount of damage, etc., must be stated in the charge and proved in evidence.

A definite sum must be mentioned in the sentence.

When damage or loss has been occasioned by the commission of an offense, stoppages ought always to be awarded.

(*i*) A court-martial has no power to award C. B., or reprimand or severe reprimand (except in the case of officers).

(*j*) N. C. O.s can be awarded the same punishment as private soldiers, but, before being sentenced to P. S., imprisonment, or F. P., they should be sentenced to reduction to the ranks.

(*k*) N. C. O. s can also be sentenced to forfeiture of seniority or to reduction to a lower grade or to the ranks.

(*See* S. 44 (h) to 44 (n), A. A., M. M. L., p. 416; S. 190 (6), A. A., M. M. L., p. 555; R. P., 47, M. M. L., p. 602.)

51. *Rank of N. C. O. s.*—In dealing with N. C. O. s, care will be taken to ascertain their permanent rank. An acting N. C. O. can not be deprived of his acting rank by sentence of court-martial. A court-martial can only deal with him in his permanent rank.

Thus a private (acting sergeant) can not be reduced by sentence of court-martial to the rank of acting corporal, nor can he be reduced to the ranks. A sergeant (acting C. S. M.), however, though he can not be reduced or reverted to the rank of sergeant, can be ordered to forfeit seniority in the rank of sergeant, or can be reduced to the rank of corporal or to the ranks. Any sentence involving loss of liberty, i. e., of one day's F. F. or upwards, will automatically reduce an N. C. O. "acting" or otherwise to the ranks.

Acting and lance ranks can only be dealt with by the man's C. O., but the probable loss of such rank as a consequence of the conviction should be taken into consideration by the court. (*See* G. R. O. 1025.)

52. *Completion of A. F. A. 3.*—After sentence has been recorded in column 4 of page 2 of A. F. A. 3, the president will sign page 2, and also the certificate on page 3. He need not sign the record of evidence.

53. *Documents.*—Only documents forming part of the proceedings will be attached inside A. F. A. 3.

All documents produced should be distinctively marked and initialed by the president. They should be attached as far as possible in the order of

their production, e. g., charge sheet, if any, record of evidence, exhibits, A. F. B. 122. Where the accused has pleaded "Not guilty," the summary of evidence need not be attached (unless it has been used during the trial in cross-examination of a witness, to point out discrepancies in his evidence. (*See* M. M. L., chap. 6, par. 58, p. 71.)

Any remark which the court may wish to make on the conduct of a witness or in connection with the trial should be attached to the proceedings in a separate minute to the convening officer.

54. *Adjournment.*—A court can always be adjourned, and in case of difficulty arising to adjourn and consult the convening officer is better than to go on and convict and eventually have the conviction quashed.

54A. *Death sentence.*—Whenever sentence of death has been passed by court-martial upon an officer or soldier the sentence is to be notified forthwith to the accused.

At the conclusion of the trial the president will cause to be forthwith transmitted to the accused under sealed cover A. F. W. 3996, duly completed and signed by himself.

In all courts-martial, therefore, the oath will be administered to members in the amended form contained in the cover of this book.

In the event of an accused being sentenced to death the president will attach to the proceedings a certificate in the following terms:

"I certify that A. F. W. 3996 has been handed to the accused under sealed cover in accordance with army council instruction 570 of 1918.

"Date ———.

"Signed ——— ———,
"*President.*"

The president must satisfy himself that the sealed over containing A. F. W. 3996 has actually been handed to the accused. Convening officers will insure that presidents of courts-martial are supplied with one copy of A. F. W. 3996 and one envelope for every accused who is charged with an offense for which sentence of death is likely to be awarded, and that they are informed of the terms of this order.

55. *Rules of evidence.*—A field general court-martial will observe the rules of evidence as strictly as any other court-martial. (*See* Army act, S. 128.) The admission of hearsay or other inadmissible evidence may invalidate the proceedings.

Great latitude, however, should be given to the defense both in cross-examination of witnesses for the prosecution and in the evidence produced by it, e. g., written statements, letters, and hearsay can be considered by the court for what they are worth, if tendered for the defense. (*See* also par. 6 (*c*).)

56. *Relevancy.*—Evidence should be excluded which does not tend, either directly or as circumstantial evidence, to prove the charge. Caution should be exercised in checking cross-examination by the defense; this may at the moment appear irrelevant, but may be intended to help in building up a defense to be disclosed later.

57. *Hearsay* and evidence of opinion are not generally admissible. For exceptions *see* M. M. L., Chapter VI, paragraphs 58–71, pages 71–73.

"Hearsay" may be taken to include any statement made not in the hearing of the accused, whether it was made by a third party or by the witness himself.

The following are example of hearsay:

(*a*) "The sergeant reported to me that accused was absent."

(*b*) "I was told by Sergt. A. that accused had struck him."

(*c*) "I spoke to the O. C. Company on the telephone and told him accused had come back to battalion headquarters and had told me he had been sent there. The O. C. Company said accused had had no such orders.

"I placed him under arrest."

(*d*) Accused said he had been in the field ambulance. "I made inquiries there, and found he had never been admitted there."

In the above examples:

(*a*) The sergeant must be called to prove the absence of accused.

(*b*) The sergeant must be called.

(*c*) The accused did not hear the conversation. The witness can only state what he did, and not what he said, i. e., "Accused told me he had been sent back to battalion headquarters by the O. C. Company. I spoke to the O. C. Company on the telephone. I then placed accused under arrest." The O. C. Company must be called to prove that he had given no such order.

(*d*) This is in effect only repeating an unsworn, uncross-examined statement made by somebody at the field ambulance. A witness must, therefore, be called from the filed ambulance to swear to the fact, from his own knowledge, that accused had not been admitted.

58. *Documentary evidence.*—(See generally M. M. L., Chap. VII., pars. 30–40, pp. 63–64.)

NOTE.—No document is admissible in evidence for the prosecution unless it has been produced by a witness on oath.

(*a*) Written statements by absent witnesses must not be put in by the prosecution as "documentary evidence," e. g., a report of an A. P. M. as to an arrest, a certificate of a M. O., a letter dealing with the facts of the case from some military authority or civilian in England. These are inadmissible for the prosecution, being "hearsay," though they may be considered if produced by the defense.

Written statements are generally inadmissible in evidence, unless it is proved that they have been written by the accused.

Certain exceptions to this rule will be found in S. 163, A. A., M. M. L., pp. 523–524, e. g., a "descriptive return" in cases of desertion (see S. 163 (1) (i) and ante p. 15), the finding of a court of inquiry on illegal absence (S. 163 (1) (g) and K. R., par. 1912); a certificate in the case of a deserter or absentee who has surrendered himself into custody (S. 163 (1) (j) and (k)).

(*b*) *Orders.*—In any case involving disobedience of written orders the prosecution must:

(i) Produce the original orders, if in existence, and if not, a certified true copy. (Verbal evidence as to their terms may only be given when it is proved that no better evidence is available.)

(ii) Show that the orders reached the accused, either directly, or by being read out on a parade that he can be proved to have attended, or by being posted in a place where in the ordinary course he should have seen them, or should, at any rate, have looked for them.

59. *Admissions and confessions.*—As to admissions and confessions by an accused, see M. M. L., Chapter VI, paragraph 74, page 74. An admission made by a soldier to an officer who is investigating a case should not, as a rule, be used against the soldier.

60. *Production of stolen and other articles.*—When a man is charged with theft, the subject of the charge should always, where possible, be produced and identified in court. If it is not produced, evidence must be given as to what has become of it.

A similar rule applies to all other articles referred to in evidence.

61. *Identification of documents, etc.*—All documents and goods, etc., material to the proceeding must be produced by one of the witnesses and identified by all witnesses who give evidence as to them.

PART III.—AFTER TRIAL.

CH. VII.—CONFIRMATION.

62. (*a*) The confirming officer is usually the officer who convened the court. (As to confirmation generally, see A. A., S. 54; as to field general courts-martial, see R. P. 120 M. M. L., p. 634.)

(*b*) Finding and sentence may be "confirmed," "reserved," or "not confirmed." These words, entered and initialed, in the case of field general courts-martial, in column 5 of p. 2 of A. F. A. 3, are sufficient. (For effect of nonconfirmation, see note 2 to A. A., S. 157, M. M. L., p. 519, and Ch. V., par. 5, p. 36. For variations see M. M. L., p. 698.)

As to cases of insanity, see G. R. O. 2030.

(*c*) In the case of finding and sentence being confirmed, Certificate C on p. 3 of A. F. A. 3 will also be signed.

(*d*) If there is any doubt about the legality of the finding or about any other point, a confirming officer may, before confirming, send proceedings up to army headquarters, or to the deputy judge advocate general direct, and they will be returned direct with a ruling on the point in doubt.

Many convictions have had to be quashed owing to defects which could have been cured by sending back the case to the court for revision before confirmation.

(*e*) An acquittal does not require confirmation.

(*f*) Reference may be made usefully to the following rules of procedure, etc.: Procedure, R. P. 51, M. M. L., p. 603; revision, R. P. 52, p. 604; miti-

gation of sentence on partial confirmation, R. P. 54, p 605; confirmation of finding on alternative charges, R. P. 55, p. 605; confirmation notwithstanding informalities, etc., R. P. 56, p. 606; finding of guilty in spite of immaterial variation from the charge, note 2 to R. P. 44, p. 599; referring confirmation, A. A., S. 54 (5); withholding confirmation, A. A., S. 54 (6), and note 10, M. M. L., p. 437. Comment on sentences K. R., par. 589.

63. *Restitution of stolen property.*—Property proved to have been stolen, etc., should be restored to its owner by the confirming officer, and a note that this has been done should form part of the forwarding minute (see Army Act, S. 75, M. M. L., p. 450).

CH. VIII.—DEATH SENTENCES.

64. *Reservation.*—A death sentence will not be promulgated without the sanction of the commander in chief, to whom it will be forwarded through the usual channels. The confirming officer should enter the word "reserved" in the last column of the schedule of A. F. A. 3, and should sign Certificate "C." Neither finding nor sentence should be confirmed.

65. *Custody of the accused.*—The confirming officer will cause the accused to be handed over to an A. P. M., and will cause to be attached to the proceedings a certificate that this has been done.

66. *Recommendations as to death sentences.*—In such cases the recommendations of the reviewing officers will be given as to whether the sentence should be carried out or commuted, and the reasons for the recommendations will be given.

67. *Death sentences for desertion.*—In particular the fullest information on the following four points is to be forwarded with the proceedings in all cases where it is considered that the extreme penalty should be inflicted for desertion:

(i) The character (from a fighting point of view as well as from that of behavior) of the soldier concerned, his previous conduct in action, and the period of his service with the expeditionary force.

(ii) The state of discipline of the regiment, battalion, or unit concerned.

(iii) The commanding officer's opinion (based on his personal knowledge, or that of his officers, of the soldier's characteristics), as to whether the crime was deliberately committed. The reason for forming that opinion will be given.

(iv) The reasons why the various reviewing authorities recommend that the extreme penalty be inflicted, or otherwise.

In cases where the essential part of the offence is "to avoid a particular duty," by these reports the commander in chief hopes to assure himself that a good fighting man is not shot for absence arising from, for example, oversight or a drunken spree.

68. *Death sentence, certificate regarding.*—When a death sentence is carried out, a certificate that the proceedings have been promulgated and a certificate that the sentence has been duly executed, giving date and time, signed by the assistant provost marshal, are to be indorsed on or attached to the proceedings; a telegram is to be sent to army headquarters, by the division, etc., concerned, giving these particulars as regards the sentence, as soon as it is carried out.

CH. IX. REVIEW OF PROCEEDINGS AND EXECUTION OF SENTENCES GENERALLY.

69. *Detention.*—With reference "Field Service Regulations," part II, section 113 (4), soldiers sentenced to detention can not be committed to the military prison in the field, and such sentences will be commuted to field punishment.

70. *Field punishment.*—When a soldier under sentence of field punishment is not doing duty in the trenches or employed at work or fatigue, he will be treated as though he were undergoing imprisonment with hard labor, and, whenever possible, he will be confined; smoking will be prohibited, and no rum ration, wine, or beer allowed. If necessary he may be kept in "irons," i. e., fetters or handcuffs, in such a way as to prevent his escape; this applies to field punishment, both No. 1 and No. 2.

When awarded field punishment No. 1, the prisoner may be attached for certain periods to fixed objects, under the conditions laid down in paragraphs 2 (b) and 4 of the rules with respect to field punishment (vide p. 721, M.M.L., and G.R.O. 2103).

71. *Unnecessary documents.*—Such army forms as B, 116, "application for a court-martial"; copies of B, 296, "Statement as to character and particulars of service accused," and A 49, "Declaration of military exigencies, under rule of procedure 104" or list of witnesses are not required.

72. *K. R. 632.*—The brigade or other commander who remits any part of a sentence awarded by F. G. C. M. is responsible that D. A. G., base, is notified of such remission.

73. *Terms of commuted sentences. A. A., S. 57 (i).* —No punishment can be considered as less punishment within the meaning of S. 57 (i), army act, if the term during which it is to be inflicted is longer than the term of the original punishment: consequently, if it is desired to commute a term of imprisonment or detention to one of field punishment No. 1, the latter will not exceed in length the term of imprisonment or detention awarded by the court. Attention is also drawn to note 9 to S. 57 on p. 440 of M. M. L.

74. *Discharges with ignominy.*—As a general rule it is not considered desirable to carry such sentences into effect during the period of the war.

75. *Variations and recommendations.*—Remissions, commutations, or variations of the sentence of the court, by any of the reviewing officers, should be entered and signed in the schedule on page 2 of A. F. A. 3; and recommendations as to suspension, etc., should be made on a separate sheet.

76. *Alterations.*—Any alteration on page 1 of A. F. A. 3, or in the first and second columns of the schedule will be initialed by the convening officer.

77. *Committals to prison.*—Except on the lines of communication soldiers sentenced to penal servitude and imprisonment will not be committed to the military prison in the field until these sentences have been reviewed by the army commander or commander in chief. Divisions, etc., will be notified when such sentences are approved or if they are suspended. Special instructions are issued on the lines of communication.

78. *Insanity.*—If an accused is found guilty but insane, he will be evacuated in custody to the lines of communication and the proceedings will be forwarded to the deputy judge advocate general, G. H. Q. (See G. R. O. 2030.)

79. *Promulgation.*—Court-martial sentences, except those on officers involving death, penal servitude, imprisonment, cashiering and dismissal, and those on other ranks involving death sentences, should be promulgated before the proceedings are forwarded. If sentences are commuted, permitted, etc., after promulgation, the proceedings, after being forwarded to higher authority, will be returned to the unit for a certificate to be entered thereon that the commutation, etc., has been noted.

80. *Review.*—The proceedings of all court-martial, whether confirmed or not, and even if the trial was not completed, will be sent, through the usual channels, to army headquarters, H. Q., L. of C. Area, or to the D. J. A. G., as the case may be, for review.

81. *Quashing.*—After confirmation proceedings will not be quashed on purely legal grounds without reference to army H. Q., H. Q., L. of C. Area, or to the D. J. A. G.

82. *Expedition.*—Every effort should be made to expedite court-martial cases. They should, therefore, be disposed of with the utmost dispatch, and minor irregularities, whilst being noted, should be left for correction until after the case has been reviewed.

Part IV.—Ch. X.—Army (Suspension of Sentences) Act, 1915.

83. *Objects of act.*—The objects of the act are:

(1) To give men, who have committed serious military offenses through exhaustion or temporary loss of nerve, an opportunity of redeeming their character and earning the remission of their sentence.

(2) To prevent wastage of troops by the withdrawal from the front of men sentenced to penal servitude or imprisonment.

(2) To prevent wastage of troops by the withdrawal in order to avoid duty shall not attain their object.

84. *Disposal after sentence.*—Except on the lines of communication, when any man is sentenced by a court-martial to penal servitude or imprisonment, he will not be committed to prison but will be kept under arrest until the directions of the "superior military authority" under the act are received.

On the lines of communication the man, if he is available as a reinforcement, will not be committed to prison until the directions of superior military authority are obtained.

85. *Superior military authority.*—The powers of a "superior military authority" are exercised by the commander in chief, the army commanders, and the G. O. C. L. of C. area.

86. *Powers of confirming and reviewing officers.*—The act does not affect the rights of confirming and reviewing authorities to commute or remit the sentence of the court-martial.

87. *Recommendations.*—Where such authorities consider that sentences of imprisonment or penal serviture should be carried out, they will state this definitely in a separate minute when forwarding the proceedings, giving reasons for their recommendations.

88. *Notification.*—When a sentence has been suspended by a superior military authority, the unit concerned is at once notified by telegram stating the date of suspension, and the soldier under sentence is released from arrest. He thereupon becomes free from any disability in respect of the sentence which has been suspended.

89. *Competent military authority.*—The expression "Competent military authority" means any general or other officer not below the rank of field officer duly authorized by a superior military authority. The powers are usually delegated to brigade commanders and other officers holding equivalent or superior commands.

90. *Field punishment and suspended sentences.*—If a soldier while undergoing field punishment is sentenced to imprisonment or penal servitude and such imprisonment or penal servitude is suspended, the previous sentence of field punishment, subject to any remission that the competent military authority may think fit to make, will continue to be carried out, and will not affect the duration of the suspended sentence. But if a sentence of penal servitude or imprisonment is put into execution, any current sentence of field punishment will cease to be carried out.

91. *Suspended sentences and stoppages, etc.*—Any part of a sentence, which would have taken independent effect if no part of the sentence had been suspended, will take effect notwithstanding suspension, *e. g.*, reduction to the ranks, fines, and stoppages for damage or loss.

But a sentence of forfeiture of pay awarded conjointly with a longer term of imprisonment becomes inoperative when the sentence of imprisonment is confirmed, and can not, therefore, take effect if the sentence of imprisonment is subsequently suspended.

92. *Trial of soldiers under suspended sentences.*—A soldier under suspended sentence may be sentenced to field punishment.

If he is sentenced to imprisonment or penal servitude, A. F. W. 3104 should be forwarded to the superior military authority with the proceedings of the court-martial, Part VII of the form being filled in and signed by the competent military authority.

The confirming authority in such cases will direct that the soldier is not to be committed to prison. (See G. R. O. 1260.)

The superior military authority may suspend a second or any later sentence and will direct whether the sentences are to run concurrently or consecutively.

The following points as to his powers in this respect should be noted:

(1) Imprisonment and penal servitude will not be ordered to run consecutively, and if the first sentence was imprisonment it is "avoided" when the sentence of penal servitude is passed.

(2) If a soldier has two sentences of imprisonment (or of penal servitude) and both are put into execution, they can only be ordered to run concurrently. If, however, a second or further term is suspended, it can be made to run consecutively on the preceding term, provided that—

(3) No soldier may be ordered to serve continuously or consecutively a period of imprisonment exceeding two years.

93. *Penal servitude following imprisonment.*—Whenever a soldier while subject to a suspended sentence of imprisonment is sentenced by a court-martial to a term of penal servitude, the confirming officer *before confirming the proceedings* will submit them for direction:

(1) In the case of soldiers serving in an army, to army headquarters.

(2) In the lines of communication area, to headquarters, lines of communication area.

(3) In the case of soldiers serving elsewhere, to the deputy judge advocate general. (G. R. O. 2152.)

In all such cases the recommendations of the confirming and reviewing authorities will be attached in the form:

"assuming that the proceedings are in order, I recommend ———.

PART V.—MISCELLANEOUS

CH. XI.—TRIAL OF OFFICERS.

94. *Convening court.*—In the absence of special circumstances rendering such a course impracticable, officers will be tried by general court-martial. Divisional and superior commanders hold warrants for this purpose.

95. *Preparation for defense.*—At the earliest practicable moment after it has been decided to assemble a court-martial for the trial of an officer a staff officer will visit him for the purpose of ascertaining that he fully understands the nature of the charge and evidence. He will invite him to state his requirements for his defense and will take such action as may be necessary.

96. *Notification.*—As soon as the date of trial is fixed the convening officer will send a telegram to "Advocate," G. H. Q., giving date, time, and place of trial, name and regiment of the accused, and the section of the Army act under which the charge is laid.

97. *Charge sheets.*—(*a*) In the case of a general court-martial a charge sheet must be signed personally by the officer in actual command of the unit to which the accused belongs.

(*b*) It is also necessary that the order of the convening officer, or a staff officer for him, directing trial by general court-martial should be indorsed on the charge sheet below the signature of the commanding officer in accordance with the illustration appearing on page 659, M. M. L.

98. *Convening order.*—It is essential that the names of the members of the court should be inserted in the convening order, or, in the case of a general court-martial, that the unit (e. g., battalion, or, in the case of the Royal Artillery, the brigade) should be specified. A convening order directing officers (unnamed) to be detailed from such and such an infantry brigade is invalid, and the court would have no jurisdiction. (See K. R., par. 577, and R. P., 20.)

99. *Rules of procedure.*—It should be recollected that general courts-martial must be conducted strictly in accordance with the rules of procedure. If any of the rules mentioned in R. P. 104 can not be observed, a certificate in accordance with that rule must be attached to the proceedings.

100. *Record of service.*—After finding, all details of the accused's service which can be obtained should be produced. In every case it is at least possible to produce the army list for this purpose.

101. *Forfeiture of seniority.*—For purposes of forfeiture of seniority the "reserve of officers" and "general list" are not corps, and a sentence of forfeiture of seniority in such a case can only be in the form prescribed at the head of page 696, M. M. L.

102. *Confirmation—AA., s. 44 (f) and (g).*—Sentences of "forfeiture," "reprimand," and "severe reprimand" may be confirmed by all officers who hold warrants to confirm G. C. M., and should then be promulgated. When the other sentences mentioned in A. A., s. 44, are awarded the proceedings can only be confirmed by the commander in chief. In such cases all authorities in forwarding the proceedings will make their recommendations upon the case.

103. *Disposal.*—Officers sentenced to penal servitude, imprisonment, cashiering, or dismissal are to be handed over to the P. M. or A. P. M. of the formation immediately after promulgation, to whom special orders have been issued. (See G. R. O. 1807.)

104. *Charge sheet and summary.*—When practicable before a court is convened the charge sheet and summary of evidence will be forwarded to army headquarters or headquarters L. of C. area for approval, or, in the case of an officer belonging to some other formation, to the D. J. A. G., through the head of the formation.

Lieut. Col. RIGBY. I would like to call attention, in connection with what I was saying, to subparagraphs *b*, *c*, and *d*, of paragraph 12, which are short, and I will read them here, if I may [reading]:

(*b*) Specially qualified officers are stationed at convenient centers (usually corps headquarters or bases) whose whole time is devoted to sitting as members of courts-martial. No case of a difficult, complicated, or serious nature should ever be tried without the attendance of one of such officers.

(*c*) A courts-martial officer will take no part in preparing for trial any case in which he may have to act as a member of the court.

(*d*) He will invariably make the record of evidence and will advise the court on all points of law and procedure. His opinion will have the same weight as that of a judge advocate. (See R. P. 103 F.)

Senator CHAMBERLAIN. I think that is a very good system.

Lieut. Col. RIGBY. Now, referring to this copy of proceedings which I have offered of two field general records, I was told by Judge Cassel that this is a complete, verbatim copy of the records, except that the names have been elided, and initials have been substituted in place of the names.

Senator CHAMBERLAIN. Is the evidence there, too?

Lieut. Col. RIGBY. The evidence is here, and it shows just the way they do it.

Senator WARREN. This is a photograph of the trials?

Lieut. Col. RIGBY. Yes, it is a photograph of these two trials, except that initials are substituted for names.

The first is the case of a man who was charged with desertion in the face of the enemy during the retreat from Mons. He was discovered at a quarter after 8 o'clock in the morning of September 6, 1914, hiding in civilian clothes in a house away from the line. A court was convened to try him that same day; he was tried that same day; he was sentenced to death that same day; the record was reviewed by the corps commander, Sir Horace Smith-Dorrien, that same day; it was also reviewed by, and confirmed by, Field Marshal French, the commander in chief, that same day; and the man was executed at 7 minutes after 7 a. m. on the morning of the 8th of September, a little less than 47 hours after the offense took place.

Senator WARREN. I am presuming that those officers who reviewed were nearby.

Lieut. Col. RIGBY. Yes; they were undoubtedly all together. It was during the retreat from Mons, and under unusually exigent circumstances. You will find something about this case in Gen. Childs' statement. He speaks of it there. He says that the man was shot and the Germans were marching over his grave within a few hours after his offense. That may be another case, which may be much stronger than this; or this may be the case he is talking about.

Senator CHAMBERLAIN. It was a very unusual case.

Senator WARREN. Yes, of course; very unusual.

Senator CHAMBERLAIN. That case did not go to the authorities in Great Britain?

Lieut. Col. RIGBY. No; it was reviewed by the Deputy Judge Advocate General attached to Marshal French's staff. But they were all there together, and of course any deterrent effect from the execution had to be then or never, and to have let that man go until after the retreat from Mons was ended, and until after the battle of the Marne, the situation would have been so much changed that there would have been no value in the execution of the death sentence, at all.

The other case is a case where the evidence shows that the offense took place in 1918. This was during the trench warfare, on September 2, 1918. That trial was had in October—October 6; and the sentence was confirmed by Field Marshal Haig on November 3, so that that took about two months to run it through. The whole proceedings are there, including all of the testimony. Those are photographs, really, of those two records; and it shows how they do it.

Senator CHAMBERLAIN. Are they typical of all the cases over there in the British army?

Lieut. Col. RIGBY. I think they are typical of the field general courts. The field general courts are intended to be, and are, very summary.

It is rather interesting, and perhaps it might be of interest to you, to put in a letter that was received by the Deputy Adjutant General's office, Gen. Childs' office, from the commander on the Rhine, in response to a request for permission to have me visit some of those field courts and have a stenographer present. The letter goes on to say that they doubt the wisdom of allowing us to visit and to have a stenographer there, because the field courts are intended to be, and are very summary, and they feared that if we had a stenographer present, the thing might not be carried on in exactly the same way, and we might not get a true picture of the way it is really done.

Senator CHAMBERLAIN. The field court is not very much different from our summary court is its procedure?

Lieut. Col. RIGBY. Their field court is very peremptory. The testimony is taken in the form of a narrative; it is written down by one member of the court, either the president or another member under the direction of the president, but it is simply summarized.

Senator WARREN. Could we act with the same haste under our Articles of War as in the particular case that you indicate there?

Lieut. Col. RIGBY. I do not see how we could. Take that first case. I do not know any way that we could grind a case through as promptly as that first case.

Senator WARREN. There are some liberties given to the accused under our rules. There is some time given to him to provide for his counsel or defense, is there not, in our law?

Lieut. Col. RIGBY. Of course many of those things can be waived, and it can be shortened by the direction of the commanding general in case of an emergency; but we always require the stenographic record, in practice, and in practice we always have a written review of the case afterwards; and we hold that there must be a reasonable opportunity for counsel, at least over night, to prepare; so in practice it would not be possible to do it as rapidly as that.

Senator WARREN. I say, it is more rapid than any way we have of handling a case under our law and practice?

Lieut. Col. RIGBY. I do not think there would be any way of getting a case investigated, referred for trial, tried, approved, and confirmed, all on the same day. I know there would not. We could not do anything like that.

Senator WARREN. I do not believe that in such a case as that the punishment was any too radical, because they were under the fire of the enemy all the time.

Lieut. Col. RIGBY. Yes, sir; it is an illustration of a class of cases where prompt punishment is necessary, and if it is not meted out promptly, it is of very little value at all, perhaps; and, as Gen. Childs says in one place in his interview, where it is necessary to take a man's life, you do not take his life because you want the man's life, but for its deterrent effect upon others; and for that purpose, in those cases action must be prompt, or it is valueless. The only other system I know of under which you could get as prompt action as that is the French system. They could, in their "special courts," waive everything.

Senator CHAMBERLAIN. In these English cases you refer to the field officer was not present, nor was the judge advocate present?

Lieut. Col. RIGBY. That first case was before the time when they appointed these "specially qualified" officers; because the date of this court-martial officer order is in September, 1916, two years later; and I do not see anything in the 1918 case, definitely showing the presence of a "specially qualified officer"; except the letters "C. M. O." following the name of "Capt. B. C.," the third member of the court, in the order convening the court, which probably stand for "Court Martial Officer."

I might, before leaving England, say something as to the other courts.

The district court does most of the work in time of peace, and the greater part of it, at home in the United Kingdom, in time of war. That court is composed wholly of officers of the army. It is composed of three or more officers, usually of three; and no judge advocate, in practice, attends that court in the great majority of cases. There is authority in the convening authority to appoint a judge advocate, if he chooses; but he almost never does. They have, however, since the creation of this body of "specially qualified officers," these court-martial officers, been using those officers sometimes as members of the districts courts. For instance, Maj. Du Plat Taylor has been sitting practically as permanent president of the London command district court for the past 18 months. The form of record of the district court is practically that shown in the form of record of the field general court. There is no stenographic record taken.

Its proceedings are confirmed by the authority that appoints the court or higher authority.

The French have, for ordinary purposes, one court, what they call the conseil de guerre, which tries all military cases. There were, during the war, some emergency courts appointed by presidential decree by the President of the Republic. They called them "special courts" ("conseils de guerre speciaux"), and sometimes in conversation referred to them as "courts-martial," as contradistinguished from their ordinary conseils de guerre.

The regular court—"conseil de guerre"—is primarily a territorial court. It is appointed for a territorial district of the army, and for a period of six months. It has no civilian members. It is composed of seven judges. In case of the trial of an enlisted man, a private, or a noncommissioned officer, one noncommissioned officer sits on the court. He must always be a noncommissioned officer. They can not appoint a private.

Senator WARREN. One out of a court of seven?

Lieut. Col. RIGBY. Yes, one out of a court of seven; and in practice, at least, they invariably use a regimental or battalion sergeant-major, what they call the "adjutant," which corresponds to our regimental or battalion sergeant-major—their highest noncommissioned officer; and he is rather closer to the status of an officer than is our sergeant-major. He wears a belt like an officer's belt, a Sam Browne belt, and he wears a uniform that looks like an officer's uniform, and a kepi that looks like an officer's kepi.

In the armies on active service—they make the distinction, not wholly between peace and war, but between the armies in the territorial districts, and the armies on active service or in a "state of

siege"; and I might say also that Great Britain in her military law makes the distinction, not between peace and war, but between "on active service" and "not on active service."

The "conseil de guerre," in the armies on active service, or in "a state of siege," consists of only five, instead of seven, judges. They are all military men. There is the same provision for one noncommissioned officer on the court on the trial of an enlisted man, whether private or noncommissioned officer. I talked with a good many French officials, military officers, and men connected with the administration of justice in their military courts, as to the plan of having the noncommissioned officer on the courts; and I tried to get their opinions; and I may say that in order to guard myself against reflecting my own ideas or thoughts in any way, in getting the information, and to be sure that I had it accurately in any event, I made a practice of taking with me two stenographers, an English-speaking stenographer and a French-speaking stenographer, and an interpreter; so that when I would ask the question in English, it would be taken down by the English-speaking stenographer in English, and then it would be translated into French, and then the French stenographer would get down the exact language of the officer interviewed, and afterwards at my office that was translated, so that I would get a picture, as near as possible, of the exact language. I did that as far as possible in every case in France.

Almost without exception the French officers think well of the plan of having a noncommissioned officer on the court. They say that, in effect, it does not make much difference one way or the other, they think, in the severity of the judgment. Some of them are inclined to think that the noncommissioned officer is a little more severe in his judgment of the men than the commissioned officers are. Some of them think that there is some advantage in getting the enlisted man's viewpoint on the court, in some cases. I think almost all of them agreed that they thought that the men were rather better pleased to feel that one of their grade was on the court; that, from their viewpoint, there was some value in it. I also asked in as many cases as I could what they would think of extending the plan so as to include private soldiers. Almost without exception they were opposed to that.

One or two were inclined to favor it. It had been proposed at one time in the French Chamber of Deputies, but was voted down. But almost everyone with whom I talked said that they felt that the private soldier would not have enough experience; so that his judgment would be of no value on the court; that they thought he would either be guided wholly by the officers on the court, or else would try in every case to let the man off. They feared that he would not be of any judicial value to the court.

I have, and could put into the record, if desired, copies of portions of interviews relating to that subject with quite a number of French officers from generals down.

Senator WARREN. I do not believe that would be necessary to put in.

Senator CHAMBERLAIN. I do not think it is necessary.

Lieut. Col. RIGBY. I also, after Senate bill 64 was introduced—a copy of it having been sent to me over there which I received some

time early in June—in the talks I had after that asked the opinions of the men I interviewed concerning the plan of having more than one enlisted man on the court. I think that with one exception everyone to whom I talked was opposed to increasing the number of enlisted men on the court. They thought that the one man on the court gave the viewpoint of the enlisted man sufficiently and that there could not be any advantage in increasing the number.

Senator WARREN. Did you find any adherence to the proposition of having a court of all enlisted men, excepting the officers conducting the trial?

Lieut. Col. RIGBY. No, sir; I found no one who favored that; and I know of no court anywhere so composed.

Senator WARREN. That has been suggested by some one.

Senator CHAMBERLAIN. I have not seen any suggestion of that.

Lieut. Col. RIGBY. I know of no court, anywhere, so composed.

Senator WARREN. No; I did not say so composed. I had understood that one quite prominent lawyer in this country had thought that better—that is, to make a jury, you might say, of the court, and make it all of enlisted men—and I wanted to know if that had been thought of over there?

Lieut. Col. RIGBY. I found no one who favored that; nor anyone, with one exception, who favored more than one enlisted man on the court, speaking from their experience, all around.

Senator CHAMBERLAIN. Then this court you speak of, the "conseil de guerre," considers cases of both enlisted men and officers?

Lieut. Col. RIGBY. It considers both, but its composition varies. In case an officer is the accused, there is no enlisted man on the court; and there is a rather elaborate table made up as to how the composition of the court has to be fixed, depending upon the rank of the accused. The higher the rank of the accused, the higher the rank of the men on the court; and it is rigidly fixed in that way.

Senator WARREN. The court is composed of men of higher rank than the officer to be tried?

Lieut. Col. RIGBY. Yes, sir; of his rank and higher, except when you get up to the provisions for the trial of a "general of division," or where a field marshal is the accused, then they have to make different provisions.

Senator WARREN. Yes, of course; but in the trial of a captain the court would be composed of officers all above the grade of captain?

Lieut. Col. RIGBY. Of the rank of captain and above; it is rigidly fixed in that way. For the trial of a captain, the court is: One colonel; one lieutenant colonel; three majors; and two captains (i. e., in the territorial armies).

Senator CHAMBERLAIN. Does the French system provide that the accussed may have counsel?

Lieut. Col. RIGBY. The French do, positively. The British do not. The British permit it. In the British courts, in the district courts, they very rarely have counsel. In the field general court they rarely have counsel. In the general court they almost invariably do have counsel. The British regulations do not permit counsel at the preliminary investigation, although as a matter of favor it is sometimes allowed at the preliminary investigation.

Senator CHAMBERLAIN. That is, the investigation before the charge is preferred?

Lieut. Col. RIGBY. During the investigation of the charge, before it is referred for trial.

The French provision is that in the regular "conseil de guerre" trial in time of peace, the charges must be read to the acused at least three days before the trial, and he must at that time be advised of his right to counsel, and that if he does not choose counsel for himself the president of the court will assign counsel to him at the trial.

In the armies on active service that three days provision may be disregarded; and in fact the whole preliminary investigation may be omitted, and the commanding general may direct, in the armies on active service, under section 156 of their code, that the accused be sent directly before the court for trial; that is, without any preliminary investigation whatever, by what they call "direct order." In that case he must be given 24 hours notice of the time that the court is to convene, and counsel for him must be named by the convening authority at the same time that he orders the case to trial. The accused may, if he chooses, then have his own independent counsel present also to assist him.

In case the three days' notice is given him, then it is not necessary to name counsel for him in advance; the practice is then the same as in the territorial armies. In practice, in Paris, and I am told in the territorial armies generally, they very frequently have civilian advocates. They have a provision in their law by which the president of a military court has the same power as the judge of a civilian criminal court, to appoint a lawyer to appear for the accused, and if a lawyer is so appointed he must serve without any fee. That is a part of the obligation of his office as an advocate.

So that, not infrequently, lawyers are assigned in that way by the court in the territorial armies at home to defend the accused.

Senator CHAMBERLAIN. Is there any appeal procedure there?

Lieut. Col. RIGBY. Yes. Will you allow me to finish, just a moment, as to the composition of the court?

Senator CHAMBERLAIN. Yes; certainly.

Lieut. Col. RIGBY. I was going to say—about the practice there in Paris—of all those trials that I attended, I think probably half the cases were defended by civilian lawyers in their robes of office. I saw a woman defend one case. She did it very well, too.

In the armies on active service the counsel for the accused is almost invariably a military man, and almost invariably assigned by the president of the court, usually on the advice of the "commissaire-rapporteur," or judge advocate. They assign in practice private soldiers very frequently as counsel for the accused. They make no distinction at all between a soldier, an enlisted man, and an officer in assigning counsel; they pick a man who they think is capable of doing it, whether he is an army officer or a private soldier. If he is a private soldier, he will wear his advocate's robe over his uniform. If he is an officer, he does not.

I talked with quite a number of men as to the advisability, in their judgment, of appointing lieutenants and private soldiers as counsel for the accused, and they all of them failed to see any reason why any distinction should be made. How much the counsel for the accused may really amount to with them, particularly in the armies on active service, I think may be just a little bit doubtful. I have

a statement by one commissaire du gouvernement—a rather naïve statement—in which he says it does not make any difference, because the court make up their minds in the armies on active service, and are very rarely influenced in any event by anything that the counsel for the accused may say.

I ought to add to that that on the other hand I got statements by several officers who seemed to think that the counsel for the accused were of value. It depends, of course, upon the personnel of the court and of the counsel.

The other class of courts that they have, that were established under the presidential decree of September 6, 1914—or that they had during the war until they were abolished by an act early in 1918—the emergency courts, what they called "special courts," were composed of three judges—one officer of field rank, one other officer, and in case the accused was an enlisted man or a civilian, the third judge was a noncommissioned officer. In those courts there was no requirement of even 24 hours' notice before sending a man to trial. The commanding general could order him to trial instantly, without any preliminary investigation whatever, appointing a counsel for him at the same time. The court might be immediately convened, he might be immediately tried, and the sentence followed immediately, and was to be immediately executed, even though it should be a sentence of death; and no appeal of any kind was allowed from those sentences.

Senator CHAMBERLAIN. That was afterwards repealed?

Lieut. Col. RIGBY. They were abolished in 1918.

Senator CHAMBERLAIN. Why?

Lieut. Col. RIGBY. I think—now, I am only saying what I think; I got various kinds of information—there had been a great deal of outcry in France against the summary proceedings of those courts.

On the other hand, the reason for the appointment of those courts was stated by Marshal Joffre, on whose recommendation the decree was entered, in a letter of September 9, 1914, in which he promulgated the decree to the army, Circular Letter No. 4487.

Senator CHAMBERLAIN. That was without legislative authority?

Lieut. Col. RIGBY. That was without specific legislative authority. And he says that the reason for it was the "imperious necessity" for a more rapid procedure than was possible with the constituted forms in use for the regular courts.

Senator CHAMBERLAIN. It was that which the legislature, the Chamber of Deputies, finally repealed?

Lieut. Col. RIGBY. They abolished the courts. The decree was merely a presidential decree, and the courts were abolished in 1918. There were a great many trials by those courts during the war from which there was no appeal allowed.

Senator WARREN. You have spoken two or three times of active service. Of course, I assume you mean by "active service," service at the front? The reason that I ask that question is that with us active service is service at the front or anywhere else, if not retired or reserve service, and I wondered if your distinction was the same over there or whether otherwise you meant service at the front or in the war.

Lieut. Col. RIGBY. No; I was using it in their technical sense. Their distinction as to the footing or status is not wholly between

peace and war as ours is, but between "on active service" and "not on active service." Even during the war you may have troops governed in France by their territorial system at the same time that others are "on active service" and subject to the regulations pertaining to that status.

In Great Britain this war was the first time in some three centuries that all troops at home were regarded as being "on active service."

The distinction, as defined in section 189 of the British Army act, is:

> The expression "on active service," as applied to a person subject to military law, means whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country.

The antithesis to that is "not on active service."

For Great Britain particularly, with her very many little wars all over the world, that plan has proven its value; because they do not want to have to have their military courts trying for murder in the United Kingdom just because there is war in Afghanistan.

I was going to say, as to the French "special courts," the only thing that operated in a kind of way as an appellate power, or power of revision, was the provision that the death sentence should not be carried into effect except upon the order of the commanding general, and the commanding general had the power, if he chose to do so, to suspend it, while consulting the pleasure of the President of the Republic.

Senator CHAMBERLAIN. There was no other appeal?

Lieut. Col. RIGBY. There was no other appeal.

Senator CHAMBERLAIN. Have you any idea how many court-martial sentences there were in France—how many trials

Lieut. Col. RIGBY. Senator, I have those figures here, as a matter of fact, but my memory is, and I will have to verify that, that those are among the papers given to me by Minister Ignace, subject to the same kind of confidential letter that the British Judge Advocate General gave to me. I will look his letter up. He reserved some things, and not others; and if it is not included, I will put that into the record, if I may.

Senator CHAMBERLAIN. That will be the total number of court-martial cases; and if possible, the average of sentences, or the aggregate of sentences.

Lieut. Col. RIGBY. Not the severity of sentences, and not the number of death sentences. Those figures we could not get. They were promising and promising, but they never gave them; and I think they felt that it was not wise to let us have them. But we got the total number of cases, and the total number of convictions, and the total number of acquittals, and divided up among the different kinds of offenses, so many for desertion, so many for this, so many for that; but we do not have the severity of sentences.

Senator WARREN. I think I ought to ask, right there, how the British and French sentences compared, as to severity of sentence, with the severity of sentences by the American Army?

Lieut. Col. RIGBY. As to the French, I can not speak by the card, because that was the one thing that, as I said a moment ago, they withheld. I know that they gave a great many severe sentences;

and they do not have the provision for detention barracks, as the British call it, or disciplinary barracks, as we call it; so that an imprisonment sentence with the French really means a sentence to imprisonment, and is a much more severe sentence than our disciplinary barracks sentence would be.

The French, however, had a plan, which they copied from the British during the war and put into force, I think, in the fall of 1917, of suspending sentences with the provision that after suspending, they might put them in force again.

Senator WARREN. Something like a parole?

Lieut. Col. RIGBY. In effect, a kind of parole. They suspended them, and the men went back and served with their units, and if they made good, the sentence was, after six months, to be canceled.

Senator WARREN. Along that line, what is the practice in our Army as to sentence; to undertake to carry out the full sentence or to make the term of imprisonment depend upon a man's conduct?

Lieut. Col. RIGBY. The latter, as I understand it, Senator. The purpose, as I understand the disciplinary barracks, is to reform the men and give them an opportunity for restoration to the colors, if they are worthy of it. It depends largely on the man himself.

Senator WARREN. Exactly. Now, do they sometimes give excessive sentences—for instance as to the length of time, a very long time—really with the expectation of reducing the time, not in the percentage by which in civil sentences they reduce it, but in proportion as the soldier deserves it by his conduct? How do you handle that? Do you follow the lines of our civil practice where there is a certain portion of time taken off the sentences for good conduct, or do you sometimes make very severe sentences with the expectation when they are made that they will be shortened, and to a much greater degree than a sentence under our civil law?

Lieut. Col. RIGBY. Of course, really both. There is a provision for shortening a sentence for good conduct; and then there is this other, also. I am told that Col. Rice, the commandant of the Leavenworth Barracks, says that it really does not make any difference to him, in recommending restoration to the colors, or putting a man in the way of restoration to the colors, what the nominal length of the sentence is, at all; it is up to the man to prove himself and make good; and if he does make good, a man under a nominal sentence of five years or ten years may be restored just as quickly as one with a nominal sentence of two years.

I think, perhaps, that two of the cases that Senator Chamberlain will remember, that were cited in the Senator's speech of December 30 of last year, were fair illustrations of that. I remember one of those cases where the man was sentenced, if I remember correctly, in June, to 15 years for absence without leave. He was released from the barracks, in the normal course of the operation of Col. Rice's plan, and restored to the colors on the 23d of December following, as a Christmas gift, so that his nominal 15 years' sentence really amounted to less than seven months. Another of the cases that was cited, I think, in the same speech, was a 10-year sentence in March; and that man went to Fort Jay and was released on the same day that the other man was released, the second day before the Christmas following, after being in the barracks just about nine months.

Senator WARREN. You would consider those as fair representations of what might be the outcome of long sentences?

Lieut. Col. RIGBY. Yes; as I understand it, Senator; certainly. Those releases were made, of course, before the special clemency board came up—before any of that controversy.

(At this point the statement of Lieut. Col. Rigby was suspended in order that the committee might hear Gen. Parker.)

STATEMENT OF BRIG. GEN. FRANK PARKER, UNITED STATES ARMY, COMMANDING THE FIRST DIVISION.

Senator WARREN. Will you please state your name and rank to the stenographer?

Gen. PARKER. Frank Parker; brigadier general, United States Army; at present commanding the First Division.

Senator WARREN. That division is now being demobilized?

Gen. PARKER. Yes, sir; it is just completing its demobilization. It will be demobilized within the next few days.

Senator WARREN. You have had duty abroad?

Gen. PARKER. Yes; I have been abroad practically for the last four years, first with the French Army, and then with our own Army.

Senator WARREN. You were with the French Army?

Gen. PARKER. I was an observer with the French Army practically throughout the war.

Senator WARREN. By appointment from the War Department here?

Gen. PARKER. Yes; by order of the War Department.

Senator WARREN. What were your duties over there? I am speaking of your duties as observer while with the French Army. What did that develop into?

Gen. PARKER. When we declared war the military mission of the United States sent me to the French general headquarters as chief of our mission at those headquarters. When Gen. Pershing arrived with his staff, in June, he maintained me between himself and the French general headquarters as his chief of mission until December of 1917, when I was given command of the Eighteenth Infantry, of the First Division.

Senator WARREN. You, of course, with your service with the French, probably speak French fluently?

Gen. PARKER. Yes; I speak French fluently. I have been with the French on a good many occasions.

I subsequently commanded the Eighteenth Infantry, and the First Infantry brigade, and the First Division throughout the hostilities.

Senator WARREN. Now, in your service has there come under your notice quite vividly the operation of courts-martial, general or special, so that you would like to express an opinion upon our present laws, our present Articles of War, as compared with the bill which is now before us and which I presume you have examined?

Gen. PARKER. Yes; I have read it over. No, sir; I am not qualified to pass upon the matters involved, because my contact with military law, certainly the last four years, has not been such as to qualify me for that purpose; but there is one point that I would like to touch upon, and that is the lack of speed in the working of

the Judge Advocate General's department during active operations of an infantry division, especially with reference to the death sentence.

Senator WARREN. Are you distinguishing Infantry service from other service?

Gen. PARKER. I am speaking only of my own unit. I commanded an Infantry unit, and I am speaking of the operation of the military law in that division during the hostilities.

Senator WARREN. Just so. Please proceed.

Gen. PARKER. I think that the greatest element in connection with military success is speed, and it is just as necessary in one department as it is in another, and I think we can improve the speed with which our military justice is meted out on the front and in a division. To make my point clear by a particular case, we will suppose that the division is about to attack to-morrow morning. We know that we are going into a bloody fight; that we shall probably lose 60 per cent of our officers and men, which happened on occasions—on one occasion with my command. Certain men deliberately go absent. They know what is in front of them; they have had it all explained to them by careful talk, what they will have to do on the following day, and they know full well what is going to happen, and they deliberately absent themselves, and later are rounded up by the military police and are brought in under guard and turned back to their companies. It seems to me that at such a time there should be some speedy method of punishing those men adequately as the military law prescribes, and promptly, not so much for the punishment to the individual as for the moral effect produced upon the unit in general. That is what I wish to see provided.

Senator WARREN. Now, we get that idea, but is that a matter of regulation or of law? Is not that possible under the law now; or is it?

Gen. PARKER. That I am not qualified to say, whether that is or not.

Senator WARREN. You are speaking of the practice?

Gen. PARKER. I am speaking of the practice as it obtained during this war under my immediate observation. We found the general court-martial as at present organized and administered very heavy and cumbersome; slow in its action; so much so that I can not recall a case of a man being shot, of the American Army, for flagrant desertion in the face of the enemy.

Senator WARREN. Along that line, what is your observation as to the general severity or lack of severity in court-martial proceedings?

Gen. PARKER. In the First Division?

Senator WARREN. You are speaking now entirely of matters at the front?

Gen. PARKER. I am speaking entirely of those matters, for I have had no other experience except when I was serving between Gen. Pershing and Gen., at present Marshal, Petain.

Senator WARREN. You were in the Regular Army?

Gen. PARKER. Yes; I was graduated at West Point, and from the French Cavalry School.

Senator WARREN. That is at Sumieres?

Gen. PARKER. At Sumieres.

Senator CHAMBERLAIN. It would be well, in your view, at the front, in cases such as you put, that these men who deliberately absent themselves just before a battle and who are brought in before the battle——

Gen. PARKER. No, sir; after the battle.

Senator CHAMBERLAIN. After the battle?

Gen. PARKER. Yes.

Senator CHAMBERLAIN. You would have it so that they could be tried at once, and executed, without the formalities that are now required?

Gen. PARKER. Without the form; not formalities. We shall always need formalities where the death sentence is to be imposed, and the person who inflicts the death penalty will at all times be responsible for it, and must explain his responsibility to the higher authorities; that, of course. But there are so many cases where the offense is so clear that I, as a colonel of a regiment, for instance, would not hesitate to order that man shot. I have told my men when they have been brought back. We have very few men of that kind. We have very few men in the American Army that do that sort of thing; I am proud to say that we have not had many, and it is just those cases that should have been made examples of.

Senator WARREN. For the benefit of the rest of the Army?

Gen. PARKER. For the benefit of the others who felt that they were going in and doing their full duty and dying, while another man was running away and escaping the death that his friend met, by his side.

Senator WARREN. Would you say there were any differences in nationalities, as to that?

Gen. PARKER. No, sir. I have served in the field with every sort of men. I spent three years with the Cubans.

Senator WARREN. That might happen with men of any nationality?

Gen. PARKER. No, sir. Courage is not the privilege of any particular nationality. I have found that one man is like another. It is the manner in which it is explained to him and the manner in which he has lived that determines the kind of man that he is going to be. We had men from 46 States in my division.

Senator WARREN. Have you not known men who have seemed for a moment to be arrant cowards, but afterwards proved to be brave men?

Gen. PARKER. Yes, sir; but not——

Senator WARREN. I am not applying that to flagrant desertion in the face of the enemy.

Gen. PARKER. Yes; you mean a man that is capable of a moment's weakness in the face of imminent danger. But I think the man that runs away from the fight before the fight, is hopeless. I think he will do that again.

Senator WARREN. We are very glad to have your opinion on that.

Gen. PARKER. Thank you, Senator.

(Thereupon, at 12.30 o'clock p. m., the subcommittee took a recess until 2.30 o'clock p. m.)

AFTER RECESS.

The subcommittee met at 2.30 o'clock p. m., pursuant to the taking of the recess.

STATEMENT OF MAJ. GEN. F. J. KERNAN, UNITED STATES ARMY.

Senator WARREN. I see you have had considerable service on the other side.

Gen. KERNAN. I was over 18 or 19 months.

Senator WARREN. I assume you know quite well what is before this subcommittee, since you were one, I believe, of the board that the Secretary called upon to make a report with reference to the Chamberlain bill as compared with the present law, and the committee would like to hear anything additional to what you gave in that report, or any changes that may have suggested themselves since you made the report, and you may allude to it as you see fit and proceed in your own way, if you will.

Gen. KERNAN. Really, Senator, the report has my signature, and the concurrence in it expresses pretty fully the general views that I entertain upon the subject of courts-martial, their functions in the governmental system and the modifications which would go at present to make a distinct improvement in that system. You gentlemen, I take it, have seen the report.

Senator WARREN. Oh, yes; and I have read it very carefully, and I think the other Senators have.

Gen. KERNAN. I may say that there might arise a little misconception about the membership of that board, as I see a fourth member is put down. The board consists of three members. The fourth man is a recorder, whose business is to take care of the papers and look after the correspondence, etc. The convening order expressly states that it is to be a board of three members.

Senator WARREN. I have forgotten about the signatures. Is it not signed by three?

Gen. KERNAN. No, the recorder signed it afterwards. It is an inadvertence.

Senator CHAMBERLAIN. That is so understood.

Senator WARREN. I so understood it. There was no misunderstanding about it. Gen. O'Ryan was before the committee, and while I think he very generally followed the lines of the report, he mentioned incidentally that there was some argument on some of the points, and there might be or might not be some difference of opinion, but not enough to prevent them all signing the report.

Gen. KERNAN. Well, the report, the general discussion, was acquiesced in by everybody. There was in three cases I think only a difference of opinion indicated as to specific recommendations in relation to the modification of certain articles. Gen. O'Ryan dissented from the majority in one case, namely, I think, as to the one hundred and fifth article of war, and I dissented twice from the other two officers and noted my dissent in each case. One of my dissents was as to the proposition of having peremptory challenges introduced into the court-martial system, and the other was as to the proposed departure from deciding questions in general by majority vote. The board adopted the two-thirds rule in lieu of the existing majority rule for deciding all questions except questions involving the death penalty. We concurred, however, in making a change by which we substituted a three-fourths vote for a two-thirds vote

in matters involving the death penalty. With those three exceptions, as far as I recollect, the report is unanimous.

Senator WARREN. Senator Chamberlain, since you are so conversant with the bill you introduced, and as you are conversant with the other, would you like to ask the general some questions about the differences?

Senator CHAMBERLAIN. General, how many changes in the present Articles of War did your board recommend, if you remember now?

Gen. KERNAN. I think we recommended something like 30 or 32 changes; that is, we recommended amendments on about 32 of the articles, and we proposed a new article, 50½.

Senator CHAMBERLAIN. You do not suggest any change in the composition of the courts as now established, or any change in the Articles of War with reference to the composition of courts as now established?

Gen. KERNAN. No, sir.

Senator CHAMBERLAIN. What is your idea about an appellate tribunal of any kind?

Gen. KERNAN. We have undertaken to provide that in article 50½.

Senator CHAMBERLAIN. That was the proposed amendment offered by Gen. Crowder to the Military Committee in January, 1918?

Gen. KERNAN. In substance it may be, but its wording I think is ours.

Senator CHAMBERLAIN. But it does not take the power out of the hands of the military authorities in any way or form?

Gen. KERNAN. No, sir; it does not put the power in civilian hands. It provides, as you will see, that each case that comes to the Judge Advocate General's Office for file and examination under the existing law shall be so examined; and if that examination discloses anything that seems to call either for clemency as now, or for a complete setting aside because of irregularities or a substantial failure of justice, that in such a case the Judge Advocate General shall make a memorandum pointing out the defects that he finds in the case and shall submit his memorandum with the record of the case to the Secretary of War for the action of the President.

Senator CHAMBERLAIN. In the last analysis, it really leaves the whole question on appeal to the Judge Advocate General, does it not?

Gen. KERNAN. It does in so far as everything except the final substantial action, which will have to be the President's.

Senator CHAMBERLAIN. But you know from your own contact with the department, with the Secretary of War, the Commander in Chief of the Army in ninety-nine cases out of a hundred follows the recommendation of the military authorities?

Gen. KERNAN. Oh, I think so.

Senator CHAMBERLAIN. Yes. So that in the last analysis the whole business would be in the Judge Advocate General's Office?

Gen. KERNAN. Very largely; yes, sir; as to recommendations.

Senator CHAMBERLAIN. Now, I am frank to say that this feature of it I do not like. I think there ought to be some appellate tribunal of some kind, or some advisory tribunal, if you please, that would have jurisdiction over these appeals.

I notice in your report—and I think that is the essential difference between those of us who are quarreling over these Articles of War, some believing that the whole system ought to be administered

within the military and others that there ought to be some civilian court of appeals to hear these mooted questions—I notice in your report here that on page 6 you question the right of Congress really to take certain functions away from the Commander in Chief of the Army.

Gen. KERNAN. Well, we put an interrogation mark at the end of each of those sentences.

Senator CHAMBERLAIN. I am glad you did, because it is a remarkable thing to say that the President as Commander in Chief of the Army inherited any of the rights which the King of England formerly exercised.

Gen. KERNAN. The thought that mainly underlies those six or seven pages is this: I think that when the Constitution declared the President should be the Commander in Chief of the land and naval forces, and so forth, the words "commander in chief" had to have read into them some definite meaning, and to find out what they mean you naturally go to contemporaneous history and to usage in the Continental armies and in the English Army to see what powers should fall under that designation, and one of the powers was to convene courts-martial and to act officially on their proceedings.

Senator CHAMBERLAIN. Do you look upon a court-martial as a judicial body or its judgment as judicial in nature or executive, merely?

Gen. KERNAN. Well, I should say they were both. I really am not a lawyer, Senator, of course, but it does seem to me that when you get down to the final analysis all courts are in aid of the executive power, are they not?

Senator CHAMBERLAIN. Well, no; I would follow the decision of the Supreme Court and say that the decisions of these military tribunals are distinctly judicial.

Gen. KERNAN. I do not feel qualified really to make fine distinctions, certainly not offhand, as to whether the particular function is executive or judicial; but I can not see why it should not be both, myself. A great many things have two aspects; are looked at in several ways.

Senator CHAMBERLAIN. I was astounded at that finding of your committee practically denying to Congress the right to legislate away from the Commander in Chief certain functions that you claimed that he inherited from the King.

Gen. KERNAN. Of course, he did not get them exclusively by inheritance. Whatever he has he got by the affirmative declaration of the Constitution that he should be the Commander in Chief.

Senator CHAMBERLAIN. Here is the way it reads [reading]:

> The rules governing armies had their beginnings not in legislative bodies, but in commanders, whether called kings or chiefs or generals, and in early times those who formulated the rules carried them out. With the evolution of Governments the right of prescribing the most important or fundamental rules has lodged in legislative bodies, but the execution of those rules, their practical administration, has heretofore been left to commanders and their assistants down through the hierarchy of command to the very bottom. Courts-martial have always been agencies for creating and maintaining the discipline of armies, and in earlier times, and certainly until the adoption of our Constitution, were provided and administered by commanders as of inherent right.

Now, I claim that they had no right except as that right is conferred by the Constitution and by Congress.

Gen. KERNAN. We were talking about early times, before the adoption of the Constitution.

Senator CHAMBERLAIN. Following that up you say:

> The King of England had and exercised this inherent right. The Continental Congress took over some of the duties of government in the rebellious Colonies, but Washington as Commander in Chief appointed courts-martial as of right inherent in that office without the express authority of that Congress. So that when our Constitution was adopted and the powers of the Federal Government were distributed among three great departments, and the President was made by the organic law Commander in Chief, the power to appoint courts-martial, by virtue of that office, was well understood. The power to make rules for the government of the land forces was at the same time confided to Congress. The earlier Articles of War continued or created under that grant of power did not expressly confer upon the President the right or authority to appoint courts-martial, but actually he exercised the power, and the validity of that action is well established. It appears, therefore, that before our Constitution was established a Commander in Chief was inherently competent to appoint courts-martial as incident to his office; that under the Constitution this right has been exercised and upheld, and further, that the rules made for the Army by Congress have extended to subordinate commanders (who are in fact assistants to the President in his special capacity as Commander in Chief) the right to appoint and to make use of this agency.

You question then in the next paragraph, which I have not read, the power of Congress to make changes.

Gen. KERNAN. Well, not all changes; not any changes. What is questioned there, Senator, is the power of the Congress to derogate from the authority conferred by the Constitution on the Commander in Chief, and the question is, what are those powers thus conferred? What does the term "Commander in Chief" connote and carry with it by necessary implication? It must mean something. Does it stop with the power merely to issue commands and then hope, please Heaven, that they will be obeyed? Or does it necessarily imply that the power to enforce obedience to the command goes with it? Now, if it does, then when you take courts-martial from the President you take away from him as Commander in Chief the weapon which is the last resort to make his commands effective?

Senator CHAMBERLAIN. Do you think Congress has not the power to change the court-martial in any way it sees fit?

Gen. KERNAN. Oh, yes, indeed; in composition, membership, name, etc. I have seen it done since I have been in the service.

Senator CHAMBERLAIN. They might change the whole function of the Commander in Chief with respect to courts-martial.

Gen. KERNAN. I do not question at all the right to install new courts-martial, or change the composition and the membership of the old ones. It is very much like this in my mind, Senator: You can create in Congress a new arm to-morrow. Call it what you please, a tank corps, something nonexistent before in our Government. But when it is created as a part of the Army of the United States it passes of necessity under the command of the President, and you would not attempt, in creating a new arm, to say that it should be commanded by the governor of a State or somebody not of the Army of the United States.

Senator CHAMBERLAIN. I think that is true.

Gen. KERNAN. Very well. In the same way, to my way of thinking, you can create all the new tribunals to enforce discipline you please, change their jurisdiction or change their composition and the way they proceed to do their work; but when you make a court-martial which is intended to be an adjunct of the Army to enforce discipline,

by the same reasoning it seems to me the use of this disciplinary weapon passes into the President's hands as a part of the function of command.

Senator CHAMBERLAIN. Do you think Congress could pass a law making the Judge Advocate General a civilian and creating a court of appeals entirely of civilians in connection with the Judge Advocate General?

Gen. KERNAN. I do not doubt its power to create new offices.

Senator CHAMBERLAIN. Do you think Congress would have the power to provide by amended Articles of War that the Judge Advocate General, when appointed, should be a civilian, appointed by the President and confirmed by the Senate? Do you think Congress would have that power?

Gen. KERNAN. Please remember that I have disclaimed being a lawyer, and in answering that question I should say that it is competent for Congress to create any new office it wants to and give it any title it pleases. The question of whether or not that office would function as you intended, it seems to me, would depend upon the duties you indertake to assign to the office.

Senator CHAMBERLAIN. You think then that the present law could be changed so that the Judge Advocate General could be appointed by the President out of civilian life—a lawyer out of civilian life?

Gen. KERNAN. I think it can be done now under existing law.

Senator CHAMBERLAIN. That of course would necessitate a change of the Article of War, because that provides for the appointment of a Judge Advocate General.

Gen. KERNAN. I think he could be appointed. I think that if the President wanted to, and Gen. Crowder's office was vacant, he could appoint a civilian to the office, and if you gentlemen confirmed him, he would be there, but transformed from a civilian into an Army officer.

Senator CHAMBERLAIN. Do you not think that Congress could pass a law creating an appellate tribunal, to which tribunal appeals from military conviction might be had, composed entirely of civilian lawyers, for instance?

Gen. KERNAN. With what functions, Senator?

Senator CHAMBERLAIN. With any functions Congress might see fit to confer upon them.

Gen. KERNAN. I think you could undertake to confer upon such a tribunal functions which would be in derogation of the Constitutional authority of the President as Commander in Chief, and if you did so, why, I should say that the attempt to do that would fail.

Senator CHAMBERLAIN. Well, then, you would question the authority of Congress to do that legally?

Gen. KERNAN. Yes, sir; constitutionally.

Senator CHAMBERLAIN. Here is what I am getting at, General—

Gen. KERNAN. Mind you, I do not say that you can not create any tribunal you please. The question is whether it is going to function or not, and that depends on the duties you place in its hands. It is possible that those duties might be taking something from another office, which is constitutionally guarded, and therefore you can not take it.

Senator CHAMBERLAIN. Suppose a man is convicted by a general court-martial in France. The court has jurisdiction and the

trial has been regular, and the only appellate tribunal that has jurisdiction is the commanding officer. Is not that true?

Gen. KERNAN. Yes, sir; now in the general case; in some cases confirmation is required.

Senator CHAMBERLAIN. That I do not think ought to be the case. There ought to be some higher tribunal to which that man might appeal. Now, I differ from Gen. Crowder in this: Gen. Crowder holds that under section 1199 of the Revised Statutes he has no power more than to revise the proceedings, to examine the proceedings, and if he finds that the court had jurisdiction and that there were no substantial irregularities in the trial, evidently he has no other function than to send it back in an advisory capacity. I think there ought to be some right of appeal, and there are a great many lawyers who think there ought to be some right of appeal; that there ought to be a power somewhere to reverse a decision which was wrong. Do you see any objection to that?

Gen. KERNAN. Oh, yes, sir; I have endeavored to set forth the objections as they appeared to me, in the report that you gentlemen have before you; and in a brief way, to repeat it in substance, the objection is that you set up an independent civilian tribunal with power to nullify the efforts of the Commander in Chief and his subordinates down through the steps of command in the exercise of what is a part of the function of command.

Senator CHAMBERLAIN. That is a strictly military view of the situation.

Senator WARREN. Let me see if I get this. I confess that I do not know much about law. The General and you want some review and the power to lessen, to quash and so forth, and as the General answers, perhaps he thinks it is to be entirely civilian, and when it goes through there is no power then either in the army or the Commander in Chief of the army, the President, to change what that tribunal may decide upon. Now as I understand the General—correct me if I am wrong—it is that whatever tribunal is established, the President of the United States is Commander in Chief of the Army, and as Commander nothing can be taken away from him in the way of the handling of the military forces, but what he has ultimately the right and duty of a commander to perform. In other words, it must in a sense be subservient to the command of the Commander in Chief all the way through. I do not know but I am stumbling, but I was wondering whether that is not the difference, since the General says there may be a civilian appointed as Judge Advocate General.

Senator CHAMBERLAIN. Let us put this kind of a case to you, General, by way of illustration. We will say that a private soldier—or so far as that is concerned, he may be a commissioned officer—is tried in France for desertion. He is found guilty. It goes up to the commanding officer, and the commanding officer approves the sentence. Now the commanding officer may not be a lawyer, he may be strictly a military man, and ever so good a man, and the trial court might be composed of men none of whom are lawyers. The approval of that sentence by the commanding officer if the court had jurisdiction and the trial was regular, ends it, although there may have been prejudicial error in the trial because of lack of knowledge on the part of the court or the commanding officer. Now

there is a man who has been convicted, and his sentence approved, and he has been ordered to the penitentiary and dishonorably discharged from the Army, and yet he has no right of appeal anywhere. Do you not think that under a democracy such as ours there ought to be an appeal somewhere, in order that justice may be done to the man who has been improperly convicted and his conviction approved by the commanding officer?

Gen. KERNAN. Yes; and I evidenced my desire by endeavoring to draft an article here which would create that sort of a court of appeals.

Senator CHAMBERLAIN. I know you have, but that is strictly within the military. Now let me put this case to you.

Gen. KERNAN. Before you leave that question, Senator, though, I want to point out that the case you have supposed could not happen. There may be no lawyer on the court, but there is always an adviser to the reviewing authority who is a lawyer, and who looks over these cases as to whether or not there has occurred prejudicial error, before the commanding general takes action thereon.

Senator CHAMBERLAIN. That is, a lawyer?

Gen. KERNAN. A judge advocate on the general's staff, invariably.

Senator CHAMBERLAIN. Have you known of many cases where the commanding officer has reversed the judgment of the court below?

Gen. KERNAN. It is not uncommom to have the reviewing authority disapprove the findings and sentences of courts-martial. It is not at all uncommom.

Senator CHAMBERLAIN. But you practically concede that there ought to be a right of appeal to some tribunal, because you recommend it.

Gen. KERNAN. Yes, sir.

Senator CHAMBERLAIN. Why recommend it if those errors are cured by the commanding officer or by his adviser?

Gen. KERNAN. In the first place, these judge advocates that I speak of on the staff of the reviewing authority, being human are liable to err, and if they do, since all these cases automatically go to the Judge Advocate General's office, they are again looked over by lawyers in that office. If there they discover something which through inadvertence was overlooked or misunderstood by the reviewing officer and his staff judge advocate, there arises a situation in which now the only cure for the defect is the exercise of clemency by the President; and that is not sufficient. It does not cover the whole needs. To make the system really complete, then, you want lodged somewhere the power to set aside as void *ab initio* those proceedings, and to restore the party to his rights as if those defective proceedings had not taken place. And we have, in this article 50½, endeavored to provide for these rare but possible cases. I say rare because it is a fact that the law applicable to courts-martial is so relatively simple that in the great majority of cases they present no matter of complexity, so that the judge advocate on the staff of the commanding general is almost certain to discover anything of a radically wrong nature; and when that happens he draws it to the attention of the reviewing officer; and that officer, unless he is incompetent, will see the point and disapprove the proceedings himself, if that is the only remedy.

Senator CHAMBERLAIN. My insistence has been, and other lawyers agree with me on that, that the Judge Advocate General has had that power under the law as it is now, but that he has not exercised it.

Gen. KERNAN. I have read the briefs submitted by Gen. Ansell and Gen. Crowder, and vice versa, on that question. Of course they have both said a great deal.

Senator LENROOT. General, in your objection to the court of appeals, is it your construction of Senator Chamberlain's bill that this proposed court would have a right to substitute its judgment upon the facts for the judgment of the court-martial?

Gen. KERNAN. Is that my objection?

Senator LENROOT. Is that your construction of the bill?

Gen. KERNAN. Well, I would have to look at it again.

Senator LENROOT. I wish you would, because I think it is quite important. I call your attention to the top of page 31, article 52. In line 22, page 30, it reads:

> Said court shall review the record of the proceedings of every general court or military commission which carries a sentence involving death, dismissal, or dishonorable discharge or confinement for a period of more than six months, for the correction of errors of law evidenced by the record and injuriously affecting the substantial rights of an accused without regard to whether such errors were made the subject of objection or exception at the trial.

Up to that time they would be limited to the correction of prejudicial errors of law. Then it goes on [reading]:

> And such power of review shall include the power—(*a*) to disapprove a finding of guilty and approve only so much of a finding of guilty of a particular offense as involves a finding of guilty of a lesser included offense.

And so on with the different subdivisions. In your opinion does the language, "such power of review," include the power and in your judgment all the power of this court-martial, power to pass upon facts as well as on judicial errors of law? Do I make myself plain, General?

Gen. KERNAN. I think so, Senator. I think I see what you are driving at. If I understand you, you want to know whether my objection to this article——

Senator LENROOT. I was getting your construction first, whether the power to include these other powers must all be based upon prejudicial errors of law, or would the court of appeals substitute its judgment if they came to the wrong conclusion?

Senator WARREN. Have jurisdiction of all matters respecting the case?

Senator LENROOT. Yes, practically. In other words, under this language could the court of appeals deal with the case in any way that it saw fit, that it thought the evidence of the record warranted?

Gen. KERNAN. It seems to me, Senator, that it is exceedingly difficult in practice to have anybody undertake to consider in a record exclusively and purely questions of law. To my mind questions of law are so intermingled and interwoven and bound up with and dependent upon the questions of fact that are in the same record that it is almost humanly impossible for a body to review the law as a thing apart in that particular case without also going into and reviewing or construing in some degree the facts.

Senator LENROOT. But that is true of appellate courts in civil jurisdictions, General. They review for errors of law. Of course

the facts may have a bearing to show whether an error of law has been committed, but an appellate civil tribunal does not attempt to substitute its judgment for the judgment of the jury of the lower court.

Gen. KERNAN. I imagine, however, in the civil practice the judges who are reviewing exclusively questions of law presented in a case are as well qualified as the trial judge or the jury to understand all the facts and the bearings of those facts and the implications of those facts, and so forth.

Senator LENROOT. They may be, but they are never permitted to substitute their judgment for that of the lower court upon the facts. Now what I am getting at, General, is, I am wondering whether you would have objection to such a court as is here provided if the court was limited in its jurisdiction to passing upon errors of law prejudicial to the accused, but not permitting it to revise the finding, or substitute its judgment upon the record for that of the court-martial.

Gen. KERNAN. In such a case, Senator, how would you propose to make the views of the reviewing tribunal effective?

Senator LENROOT. Exactly as we do in civil tribunals. It would be sent back if there were errors of law prejudicial to the accused, and give him the opportunity to get a fair trial, and if there were no such errors of law, whatever the appellate court might think as to the justice of the verdict, they would have no jurisdiction to pass upon that.

Gen. KERNAN. Certainly if you are going to make an innovation of the kind suggested here in this article, I should much prefer to see it limited as you say, Senator, to a review of the errors of law exclusively.

Senator LENROOT. I am inclined to the construction of this bill that the words "such power of review shall include the power," together with these subdivisions, give this court of appeals the right to pass upon its view of what the evidence justified, although there may have been no prejudicial error committed by the court-martial.

Senator WARREN. That is your construction of the proposition in this bill?

Senator LENROOT. Yes.

Senator CHAMBERLAIN. I think the General has so fully embodied in the Kernan report his views on this, that I do not think it is necessary to interrogate him further.

Senator WARREN. You stand now as when you made the report, as not wishing to make any change, addition to or subtraction from it?

Gen. KERNAN. Yes, sir.

If I could be of any use at all it seems to me it might be in taking up these concrete propositions which we have embodied here in the appendix.

Senator LENROOT. Of your proposed revision? You comment on each of them in the report?

Gen. KERNAN. Yes, sir.

Senator LENROOT. Are there any of those that you would like to enlarge upon?

Gen. KERNAN. There are several which I regard as of very considerable importance, and based on a great deal of court-martial experience. I have been 38 years a commissioned officer, I have been a department judge advocate, for instance, for four years, and

I have been on many courts in all capacities and what I have reported here in some of these matters represents a great deal of experience and reflection, and for that reason I believe that perhaps if I were——

Senator WARREN. Feel free to take up any one of them and explain further and make any comment that you wish. We are seeking light; the more the better.

Gen. KERNAN. The first that I want to refer to is our proposed amendment to article 4. There we undertook when possible to exclude officers of less than two years' experience from sitting on a court-martial except as a minority.

Senator WARREN. In extremity what would you do?

Gen. KERNAN. We have proposed an absolute rule in time of peace, but not in time of war, when you have got to do what the occasion calls for or do nothing. Now I think that that is a very useful provision, because a great many of the more or less absurd sentences and perhaps unjustifiable findings that are arrived at by courts-martial are due to inexperience and lack of knowledge, not of law chiefly, but of the service, of the relations that the acts of the men under trial really have to the service. Why, in the first two years of the service a man appointed from civil life is hardly familiar with the terminology of the Army, and hardly knows what the terms mean, and he is therefore not qualified by experience or by acquired knowledge to really sit and judge of the relation which the deeds committed bear to the Army. At the same time those young men have got to learn sometime. Therefore it is highly advisable to give them an opportunity to get experience and to see how courts work in practice, so that we ought to have them sit on courts. But not in sufficient numbers to have a decisive voice in the results.

Senator WARREN. I take it you know that there have been absurd sentences?

Gen. KERNAN. Oh, undoubtedly.

Senator WARREN. And others with excessive penalties, you might say? Now, as I remember it, you gave your idea of the percentage of those, that they were not a large percentage of the whole. Did those things occur because of immature officers, do you think—immature in their judgment upon law and upon the practice of courts-martial?

Gen. KERNAN. Very largely, Senator: not entirely due to that, but I believe in the few cases that I have actually looked over, the courts were composed of officers of very small average experience.

Senator WARREN, You have been abroad a good deal of the time. Was that as true over there as here in this country; or, if not, what was the percentage?

Gen. KERNAN. I could not undertake to give percentages, Senator.

Senator WARREN. Approximately, that is all.

Gen. KERNAN. The few cases that I looked at were nearly all cases in this country at small stations relatively, where the choice of membership for the courts was much limited. Convening authorities had to put on the court the material they had, and it was inexperienced material, because the more experienced officers were elsewhere, on the other side or in Washington, where the duties were more important.

Now, another thing that we have suggested is the appointment on every court, by the convening authority, of counsel for the defense. The real trouble in courts-martial, apart from the immature member-

ship to which I have just referred, comes from a poor presentation of the case on the one side by the judge advocate who is prosecuting the case, and on the other side by no counsel at all or counsel of no experience.

Senator WARREN. The accused has the benefit of having counsel, does he not?

Gen. KERNAN. Yes.

Senator WARREN. Suppose he chooses his counsel from privates or noncommissioned officers?

Gen. KERNAN. The practice is to always allow him to select counsel if available, or to hire civilian counsel. Failing that, the commanding officer may appoint counsel to defend him as a matter of course.

Senator WARREN. Is there any distinction made as to the accused's selection, whether it may be of a commissioned officer, or a noncommissioned officer or private, or a civilian?

Gen. KERNAN. No; that feature remains the same so far as anything we propose to do.

Senator WARREN. That is the practice as well as the law?

Gen. KERNAN. Yes; it has always been so to the best of my knowledge. Now, to cure that radical defect we have proposed in one of these articles to authorize the Secretary of War to appoint acting judge advocates who shall be available to the reviewing authorities for detail as judge advocates and as defense counsel in important cases, and for other work, judicial or near judicial, which shall arise in the command. You have now and have had since 1884 an authority for appointing acting judge advocates. Gen. Crowder served a tour in that capacity and was appointed at the end of it in the regular corps. I, myself, served a tour of that kind. Many lieutenants have had an apprenticeship as acting judge advocate, on a four-year detail; and it is a highly useful detail to a youngster, because it gives him a special class of work and some additional pay. He gets the rank, pay, and emoluments of a mounted captain.

Senator WARREN. Has it been the practice to have more of those apprentices than were expected to be taken permanently into the service, in order to have some selection?

Gen. KERNAN. The original thought, Senator, was that there were not enough judge advocates in the regular corps to provide the staff judge advocates; therefore that provision originated through that necessity. It has been modified once or twice since as to the number of officers detailed to these headquarters having general court-martial jurisdiction, and it became necessary to increase the number of these acting judge advocates. Originally they were limited to one for each general court-martial jurisdiction.

Senator WARREN. Well, I do not know as you understood my question. I seem to remember that in some of our appropriation bills we provided that there should be a sort of cadet service, you might say; that certain officers should be detailed to study and be used for a term in the judge advocate's office with the intention of selecting from them so many of them as they wanted to make general use of. Am I right about that or not?

Gen. KERNAN. Yes, sir; since 1884 you have had acting judge advocates detailed by the Secretary of War for four years or less.

Senator WARREN. That means they can be taken into the service or not?

Gen. KERNAN. If there were vacancies in the Judge Advocate General's Department they generally went in as I say; but if there were not vacancies to take them in, some remained in the line of the Army, just as I have done. Now, if you take the limit off and allow a sufficient number of these to be detailed, you will have a corps of students to be available for these special duties of counsel and judge advocates.

Senator LENROOT. May I ask you in that connection, at the time of the appointment of these acting judge advocates, what is, as a rule, their knowledge of law?

Gen. KERNAN. Only those who have made a study of law and have evinced a special interest in it are so detailed, and it is only because of that fact that they are detailed as acting judge advocates. To illustrate, in Gen. Crowder's case, he had been detailed to a college in Missouri, and while on duty as professor of military science there he studied law and was admitted to the bar, and after that, by reason of that fact, he was made an acting judge advocate. I did the same thing when I was instructor at West Point. I studied law at an office in New York and was admitted to the bar of New York, and as soon as available thereafter was detailed as an acting judge advocate.

Senator LENROOT. My point was, is the selection of acting judge advocate limited to those who have studied law?

Gen. KERNAN. Not by law.

Senator LENROOT. In practice?

Gen. KERNAN. In practice, I think, yes; they endeavor to get men who have envinced a special aptitude for law and have shown qualifications.

Senator WARREN. Let me state a case. Gen. Ansell was at a point in Wyoming when he was a lieutenant. A man under a serious accusation was being tried in a local court, I think it was the police court—and he happened to be passing by, so the story goes. I did did not hear the trial, but they told me the next day about the excellence of the young officer who had volunteered to defend the man in a very serious case. And his ability was such that his reputation preceded him here to Washington, and when some of our friends from the Southern States asked a little later on that he be taken into the Judge Advocate General's office, that was done. I think I was one of those who testified to Gen. Davis, then Judge Advocate General, about the case. While I did not know what the case was about, it had been reported stenographically, I think; and I believe that incident led to his appointment. It was due to the observance of what he had done.

Gen. KERNAN. I think that is the general history of nearly all the officers who are appointed.

Senator WARREN. I know that Gen. Davis at that time, in speaking of it, said he wanted to hear of all those cases in order that he might have a large number from which to select from time to time. That seemed to be at that time the idea—to have the best they could get.

Gen. KERNAN. In article 12 we have undertaken to really enlarge in many cases the jurisdiction of the present court-martial by conferring discretion on the officer who might appoint a general court-martial in the case by the exercise of which discretion he could remit it to a special or even a summary court for disposition.

Senator CHAMBERLAIN. All of your proposed changes are proposed to be made in the present law, not the so-called Chamberlain bill. I think that is what is indicated here. The proposed law is given in the left-hand column.

Gen. KERNAN. That is our proposition.

Senator CHAMBERLAIN. Take on page 18 for instance, that italicized portion. There is your proposed change of the existing law?

Gen. KERNAN. Yes, sir.

Senator CHAMBERLAIN. You are not proposing changes in the law I have proposed?

Gen. KERNAN. No; our changes are proposed in the existing statutes.

Senator WARREN. That is the way I understood the report.

Gen. KERNAN. We propose to change the oath a little so as to permit the court to dispose of some matters in open court which are now disposed of in closed court. That is to endeavor to save time. Courts are cleared, and the people have to get out many times in order to settle merely trivial matters which could be disposed of offhand, subject to objection by any member who might have a different view.

Senator. WARREN. That is with a view of expediting matters?

Gen. KERNAN. Yes, sir. All we propose to keep secret relates to challenges, to the findings and the sentence

Senator WARREN. General, we thank you for appearing as a witness.

(Thereupon, at 3.25 o'clock p. m., the committee adjourned until to-morrow, September 25, at 10.30 o'clock a. m.)